87-1837

No. 87-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

PARKVIEW ASSOCIATES,

Appellant,

v.

CITY OF NEW YORK, COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK and CIVITAS CITIZENS, INC.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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Questions Presented

1. Has New York City deprived an owner of property without due process where the City prepared and published a zoning map, encouraged the public to rely upon that map, distributed that map to the municipal officials responsible for administering its zoning laws as the only tool available to those officials for identifying zoning district boundaries when they review applications for building permits, issued a building permit for a 31-story building on the basis of that map, decided thereafter that its map was wrong, and then waited seven months, *i.e.*, until after the owner had topped off its 31-story building, before notifying the owner of the "error" and directing it to remove the building's top twelve stories?

2. May New York City shield itself from the constitutional requirements of due process by asserting that its officials' actions are *ultra vires* and not subject to principles of equitable estoppel?

3. May New York's highest court properly avoid adjudicating appellant's claim that its right to due process has been violated by characterizing that claim as premature?

Parties to the Proceeding

The caption of the case in this Court lists all parties to the proceeding. Appellant has no parent companies, subsidiaries or affiliates as those terms are used in Supreme Court Rule 28.1.

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Opinions Below

This appeal is from a final order (Appendix 1) of the Court of Appeals of the State of New York. That order is based upon an opinion (Appendix 2) that is reported officially at 71 N.Y.2d 274 and unofficially at 519 N.E.2d 1372 and 525 N.Y.S.2d 176. The order affirmed an order of the Appellate Division, First Judicial Department, of the Supreme Court of the State of New York (Appendix 3) that is reported officially at 129 A.D.2d 405 and unofficially at 513 N.Y.S.2d 342. The Appellate Division's order was not accompanied by an opinion but recited that it was based upon "the reasons stated by" the lower court.

The court of first instance, *i.e.*, the Supreme Court of the State of New York, County of New York, issued a "Decision and Judgment" (Appendix 4) that is not reported. The judgment refused to disturb a resolution (Appendix 5) of appellee Board of Standards and Appeals (the "BSA") and a written determination (Appendix 6) of appellee Commissioner of Buildings, neither of which is reported.

Jurisdiction

This litigation was brought pursuant to Article 78 of New York's Civil Practice Law and Rules ("CPLR"), which governs proceedings to review the actions of public bodies and officers. The litigation challenges a determination of the Commissioner of Buildings and a resolution of the BSA. The Commissioner's determination (a) partially revoked a building permit that had been granted to appellant several months previously for a 31-story building (a building that, in the meantime, appellant already had largely constructed) and (b) directed appellant to remove the building's top twelve stories. The BSA's resolution sustained the Commissioner's determination.

The Supreme Court, New York County, dismissed appellant's petition, and the Appellate Division affirmed. On February 9, 1988, the Court of Appeals also affirmed, and on April 28, 1988, it denied reargument.

Appellant now appeals to this Court pursuant to 28 U.S.C. § 1257(2) on the ground that New York's highest court has rendered a final decree in which it has rejected a claim that provisions of New York City's Administrative Code and its Zoning Resolution have been applied to appellant in a manner that is repugnant to the Constitution of the United States. The notice of appeal (Appendix 7) was filed with the Court of Appeals and the court possessed of the record on May 6, 1988. The appeal is being docketed in this Court within 90 days of the order appealed from.

Constitutional and Statutory Provisions

1. Fourteenth Amendment, United States Constitution:

   > No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of . . . property, without due process of law . . . .

2. New York City Administrative Code § C26-118.7 (now recodified as § 27-197):

   > The commissioner [of buildings] may revoke any permit . . . whenever any permit has been issued in error and conditions are such that the permit should not have been issued.

3. Relevant provisions of the New York City Zoning Resolution are annexed hereto as Appendix 8.

Statement of the Case

Kafka wrote the facts of this case. In accordance with its regular procedures and after meticulous and lengthy review of the underlying building plans, the City of New York issued to appellant a permit authorizing the construction of a 31-story building. At that time, appellant and the officials who issued its permit believed that the permit conformed with the City's zoning ordinance. Proceeding in good faith, appellant then commenced and largely completed construction, topping the building off at 31 stories.

At that point, after several months of construction, the City revoked appellant's permit to the extent that it authorized construction above the 19th floor, and it directed appellant to remove the building's top twelve stories. According to the City, its own zoning map, *i.e.*, the map expressly incorporated in the City's zoning ordinance, which was the map on which appellant's architects *and* the officials who issued appellant's permit had relied, contained an error: it failed to show that a zoning district boundary that appeared to be perfectly straight for

nearly two miles actually contains a small protuberance that juts out for 50 feet at appellant's block, so that most of appellant's property is inside a special district in which construction may not exceed 19 stories. To compound the injustice, although the City noticed the "error" on its map at about the time that appellant was commencing construction, it waited at least seven months (during which time appellant nearly completed the building) before notifying appellant of the "error."

This building would be indisputably legal if it could be moved a mere 50 feet, but all construction above the 19th floor has been halted since 1986. The City insists that it is entitled to the strict enforcement of its zoning laws, and New York's highest court has agreed. The facts are set forth below in detail.

A. The Parties

Appellant, Parkview Associates, is a limited partnership. It owns the real property (the "Property") at 108 East 96th Street in Manhattan.

Appellees include the City of New York and various agencies thereof. The Department of Buildings is responsible for examining plans for the construction of buildings, determining whether such plans conform with the City's zoning ordinance, and issuing permits for construction. The Commissioner of Buildings is the Department's chief officer. The BSA hears appeals from determinations made by the Commissioner.

The remaining appellee, Civitas Citizens, Inc. ("Civitas"), is an intervenor in the litigation. It characterizes itself as "a membership organization devoted to preserving and enhancing the quality of life on the upper east side of Manhattan," and it claims that its members "have suffered a degradation in the quality of the urban environment in which they reside, including a loss of light and air, . . . by reason of the construction" of appellant's building.

B. The Property

The Property is a rectangular lot on the south side of East 96th Street, between Park and Lexington Avenues. Its frontage along 96th Street extends for 100 feet, from 90 feet east of Park

Avenue eastward to 190 feet east of Park Avenue. An affiliate of appellant acquired the Property in 1982, at which time it was vacant.

C. The Zoning Resolution, the Zoning Maps and the Procedures for Amending Them

New York City's zoning ordinance is entitled the "Zoning Resolution." It is a massive document, more than 900 pages in length. It has been published by the City's Department of City Planning in a looseleaf format that can be updated to reflect changes. That looseleaf format is used by all owners and professionals who require reference to the City's zoning laws; it is the only codification in existence; and it is the only version available to and used by the personnel of the Department of Buildings, which is the agency principally responsible for administering and enforcing zoning law in New York City.

The Zoning Resolution also contains 125 "zoning maps" that are intended to depict the boundaries of the various zoning districts created by the ordinance. These maps are physically bound with the Zoning Resolution and are expressly incorporated in it under the plain and unambiguous language of the statute. Thus, Zoning Resolution § 11-14 provides:

> The location and boundaries of the districts established by this resolution are shown upon the zoning *maps*, which are hereby incorporated into the provisions of this resolution. The said *zoning maps* in their entirety, including all amendments thereto, shall be as much a part of this resolution as if fully set forth and described herein.

(Emphasis in original.) Except for these zoning maps and the statute's rules for construing them, there is nothing in the Zoning Resolution that identifies the location of zoning district boundaries. The particular zoning map on which the Property appears is known as "map 6b."

The zoning maps are subject to amendment under City Charter § 197-c, pursuant to which proposed zoning legislation is prepared by the Department of City Planning (which provides staff assistance to the City Planning Commission [*see* Charter § 191(b)(3)]) and eventually approved, disapproved or modi-

fied, after public hearings, by the Board of Estimate. When the Board of Estimate acts, it does so by adopting "resolutions" that we refer to as "enabling resolutions" to distinguish them from the Zoning Resolution itself. These enabling resolutions describe the changes to be made to district boundaries in words (or by "metes and bounds"), but neither these enabling resolutions nor the "metes and bounds" descriptions contained therein appear in the Zoning Resolution—except to the extent that the Department of City Planning subsequently translates them into changes to the visual depictions of the zoning districts on the zoning maps that are incorporated in the Zoning Resolution.

When the enabling resolutions are considered by the Board of Estimate, they are accompanied by (and expressly refer to) diagrams that have been prepared by the Department of City Planning and certified by the City Planning Commission. These diagrams depict the zoning of the relevant area once the proposed amendment has been promulgated. The diagrams are maps, but they are not the "zoning maps" incorporated in the Zoning Resolution.

D. The PI District

In 1973, the Board of Estimate established a Special Park Improvement District (the "PI District") on Manhattan's Upper East Side, in the vicinity of Fifth, Madison and Park Avenues between East 60th and 96th Streets. The maximum height of buildings in the PI District may not exceed the lesser of 210 feet or 19 stories. Zoning Resolution § 92-06. When the PI District was established, its eastern boundary, generally and at 96th Street in particular, was 150 feet east of Park Avenue.

The Property is thus at the *extreme* corner of the district, and there are several high-rise buildings in the vicinity.

E. The Redrawing of the PI District's Boundaries and the Revisions to Zoning Map 6b

On March 3, 1983, the Board of Estimate adopted an enabling resolution whose text (1) described in words changes to be made in the PI District's boundaries and (2) expressly stated

that those changes where "as shown on a diagram dated October 25, 1982." The "metes and bounds" description in the text of the Board's resolution did not refer to any change in the boundary at 96th Street, which had been 150 feet east of Park Avenue. But the accompanying certified diagram unequivocally showed that boundary to be 100 feet east of Park Avenue. There was, thus, an inconsistency between the "metes and bounds" description in the text of the enabling resolution and the visual depiction on the certified diagram incorporated in that resolution.

After the Board of Estimate's action, the Department of City Planning, *i.e.*, the agency that had prepared both the Board of Estimate's enabling resolution *and* the certified diagram incorporated therein, revised the relevant zoning maps to reflect the legislation of March 3, 1983. Accordingly, in the spring of 1983, it published a new version of zoning map 6b for inclusion in the Zoning Resolution. This new map 6b contained no printed number to indicate the distance between Park Avenue and the PI District's eastern boundary at 96th Street. Therefore, under the express terms of Zoning Resolution § 76-131(c), this new map, unlike the prior version of map 6b, depicted that boundary as located *100 feet* east of Park Avenue.[1]

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1 In most cases, the zoning maps show the precise location of zoning district boundary lines by specifying, near the boundary, the number of feet between that boundary and the nearest street. The Zoning Resolution also contains provisions (§ 76-11, *et seq.*) that govern those instances in which no such dimensions are specified on the maps. One of these statutory provisions expressly governing interpretation of the zoning maps, *i.e.*, Zoning Resolution § 76-131(c), provides in pertinent part as follows:

> In cases where a boundary line extends parallel to the short dimension of the block [*i.e.*, in the present case, parallel to Park Avenue] and no dimensions are shown, such boundary line *shall be considered to be located*:
>
> • • •
>
> (c) In the case of all other districts, 100 feet from the nearest *street* within the district [*i.e.*, in the present case, 100 feet from Park Avenue].

(Emphasis added in part.) The Zoning Resolution also provides, in § 12-01(c), that "[t]he word 'shall' is always mandatory and not discretionary."

On May 24, 1984, moreover, the Board of Estimate approved additional legislation affecting zoning map 6b. Like the legislation of March 3, 1983, it included a diagram certified by the City Planning Commission that clearly depicted the PI District's boundary as 100 feet from Park Avenue at 96th Street. After this legislation had been approved, the Department of City Planning prepared a further revision of zoning map 6b that thereafter was distributed for inclusion in the Zoning Resolution. Like its immediate predecessor, this version of map 6b contained no printed number to identify the PI District's dimensions at 96th Street; it thus depicted the district's 96th Street boundary as 100 feet east of Park Avenue.

This version of zoning map 6b remained the current version in circulation—*i.e.*, the version in all properly updated copies of the Zoning Resolution published by the Department of City Planning—until December of 1985.

F. Appellant's Application for a Building Permit and Its Reliance on Zoning Map 6b

At the end of 1984, appellant instructed its architects to prepare plans for a condominium apartment building to be constructed on the Property. The architects filed their initial set of plans with the Department of Buildings in the spring of 1985.

At that time, had zoning map 6b shown the PI District's eastern boundary, at 96th Street, to be 150 feet (rather than 100 feet) from Park Avenue, appellant's architects could have designed, and appellant would have constructed, a wider building that did not exceed 19 stories in height, and that contained 100,000 square feet of space—as opposed to the 78,000 square feet that will remain if appellant removes the top twelve stories of its existing building.

At all relevant times in 1984 and 1985, however, zoning map 6b showed the PI District's eastern boundary, at 96th Street, at *100 feet* east of Park Avenue. Therefore, all building plans submitted to the Department of Buildings on appellant's behalf were prepared in the belief that that was the boundary's location.

G. The Scrutiny of Appellant's Plans by the Department of Buildings and Civitas, and the Issuance of Its Permit

In July of 1985, appellant's architects submitted for review by the Department of Buildings revised plans for a 31-story building, with a ten-foot-wide setback above the 19th story so that the building's height would be limited to 19 stories on the portion of the Property within 100 feet of Park Avenue.

As required by the applicable statute (New York City Administrative Code § C26-118.1, now recodified as § 27-191) and the Buildings Department's written internal directives, all of appellant's plans were scrutinized painstakingly by a Buildings Department examiner who was a civil engineer, who admittedly was responsible for "examining applications for zoning purposes," who specifically reviewed zoning map 6b, and who raised *numerous* zoning objections to aspects of appellant's plans—none of which involved the location of the PI District's boundary. The examiner plainly shared the understanding of appellant's architects that the PI District's eastern boundary was 100 feet from Park Avenue at 96th Street.

On August 12, 1985, after appropriate adjustments had been made to the plans to eliminate the examiner's objections, the Department of Buildings approved the revised plans as conforming with all zoning requirements. On September 24, 1985, it issued an excavation and foundation permit. Excavation commenced in October of 1985 and was completed in November, at which time foundation work commenced. Installation of the foundations was completed later that month.

Throughout the fall of 1985, appellant's building plans were matters of public record, available for inspection at the Department of Buildings. During this time, Civitas and other activist groups admittedly "examined the building plans and discussed them with representatives of the Department of Buildings"—and admittedly concluded that the PI District "stopped 100 feet east of Park Avenue," and that appellant's "proposed building was in full compliance with the Law."[2]

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2 The quotations are from a letter dated July 30, 1986, sent to the Commissioner by one of the activist groups. In a circular dated July 22,

In November of 1985, moreover, the Department of Buildings reviewed appellant's application once more to determine whether appellant's plans complied with applicable zoning requirements. After this review, the Department of Buildings again determined that appellant's plans conformed with all zoning requirements. Two days later, on November 21, 1985, the Department of Buildings issued a full building permit authorizing construction of a 31-story building.

Significantly in view of the furor that subsequent events generated, there never has been *any* contention in this litigation that the permit was procured or influenced by corruption. The City's Office of the Inspector General conducted an investigation into its issuance and found no evidence whatsoever of wrongdoing.

H. The Secret Revision of Zoning Map 6b

At some point in 1985, the Department of City Planning concluded that zoning map 6b did not correctly depict the PI District's boundary at 96th Street. It therefore revised map 6b to show that boundary at 150 feet rather than 100 feet from Park Avenue—a revision that was effectuated by adding the number "150" to the map at the northeastern corner of Park Avenue and 96th Street, thereby eliminating the applicability of Zoning Resolution § 76-131(c).

The Department of City Planning disseminated this revised version of map 6b, however, in a manner that concealed from the public the possibility that the zoning map might previously have contained an error: in December of 1985, the Department of City Planning published a new looseleaf version of the entire 900-page Zoning Resolution, including all 125 or so zoning maps; the revised version of map 6b was published for the first time in this new edition of the Zoning Resolution. The revised

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1986, Civitas acknowledged that, "[s]everal months ago," it had been "alerted to a building being constructed at 108 East 96th Street," had "examined the building plans at the Department of Buildings" and had ascertained that the PI District "extended for *100* feet along 96th Street from Park Avenue" (emphasis in original).

map 6b contained no indication, on the map itself or on its legend, that it differed in any way from the immediately prior version—unlike other occasions, when the Department of City Planning has noted on its maps' legends that the maps reflect corrections or "clarifications." Similarly, the cover page of the new edition of the Zoning Resolution contained no indication that a change had been made on zoning map 6b. In fact, it created the *opposite* impression: it informed subscribers that the revised Zoning Resolution contained "[a]mendments" to 17 specifically enumerated zoning maps; it did *not* include map 6b among those 17 enumerated maps.

No one at the Department of City Planning appears to have called the change to the attention of the Department of Buildings, even though that agency was responsible for administering the Zoning Resolution; no one notified appellant or its architects of the change; no one even tried to determine whether there were pending construction projects or applications, or outstanding building permits, that might be affected by the change—even though the change affected only one block. Because appellant's plans already had been approved, and its permit already had been issued, appellant and its architects had no occasion to consult this new version of map 6b. Therefore, they were not aware of the change.

I. Appellant's Construction Pursuant to Its Permit

After receiving its permit on November 21, 1985, appellant proceeded with construction. By July of 1986, it had spent $7.2 million in actual construction costs, virtually all structural work (including all steel erection work and the installation of bulkheads and plumbing and electrical risers) and substantial mechanical work had been completed, and the building had been topped off at 31 stories.

Throughout this period, neither appellant nor its architects had any inkling that appellant's permit might be infirm. The president of appellant's general partner, who was "the person . . . principally responsible for the basic decisions to purchase the Property and develop it," testified by affidavit as follows:

> I want to assure this Court of the following, and I want to state this as clearly and unequivocally as possible: At no time prior to July of 1986 did I (or anyone else at Parkview or any of its affiliates) have any inkling that there might be anything suspect or infirm about the validity or propriety of the permits and approvals pursuant to which we were constructing the 31-story building on the Property.

In its pleading, which was verified, appellant testified to the same effect. Appellant's chief architect testified that it was not until July of 1986 that he learned that "the relevant boundary . . . purportedly was something other than 100 feet" from Park Avenue.

J. The Partial Revocation of Appellant's Permit

On July 11, 1986, the Department of Buildings suddenly directed appellant to stop work and advised it that its permit would be revoked unless it demonstrated that it was entitled to proceed with construction above the 19th floor. This order was appellant's *first* notice that its permit might be suspect, or that there might be a question as to the location of the PI District's boundary.

By letter dated July 21, appellant explained to the Department of Buildings in detail why its permit was valid. On the next day, July 22, after a purportedly "thorough review" of appellant's submission of the previous day, the Commissioner of Buildings revoked the permit to the extent that it authorized construction above the 19th floor, and directed appellant to submit plans for a building that would not exceed 19 stories. This partial revocation was premised upon New York City Administrative Code § C26-118.7 (now recodified as § 27-297), which provides that the Commissioner "may revoke any permit . . . whenever any permit has been issued in error and conditions are such that a permit should not have been issued."

If appellant complies with this directive and removes the top twelve floors from its building, it will suffer a loss on its investment in the Property that will exceed $9 million.

K. Appellant's Appeal to the BSA

On July 23, 1986, appellant appealed to the BSA, pursuant to City Charter §§ 666(7) and 1806, from the Commissioner's determination. By resolution dated October 14, 1986, the BSA affirmed that determination. In doing so, the BSA considered only one issue (*i.e.*, the correct location of the PI District's boundary "at all relevant dates"), and it expressly declined to "rule on any issue related to a developer's reliance on an erroneously issued permit."

L. This Litigation and Appellant's Assertion of the Questions to Be Reviewed

On October 16, 1986, appellant commenced this proceeding to challenge the BSA's determination and, in addition, to challenge the Commissioner's action on equitable and constitutional grounds that the BSA had disclaimed the power to consider.

Appellant asserted in its petition that the partial revocation of its permit had been improper, because (1) the permit had been issued properly and in conformity with the Zoning Resolution (first cause of action), (2) appellant's right to complete construction pursuant to the permit had vested (second cause of action), (3) the City was estopped from revoking the permit (third cause of action), and (4) the revocation deprived appellant of property without due process of law or just compensation, in violation of appellant's rights under, respectively, the state and federal constitutions (fourth and fifth causes of action). Appellant expressly asserted in its petition that the actions complained of had "deprive[d]" it "of its property without due process of law or just compensation, in violation of the Fourteenth Amendment to the Constitution of the United States."

The City opposed the petition and counterclaimed for an injunction against the maintenance on the Property of a structure that exceeds 19 floors. Civitas also opposed the petition.

In a Decision and Judgment dated November 18, 1986, the court of first instance rejected all of appellant's contentions and dismissed its petition, essentially on the theory that the PI Dis-

trict's boundary was 150 feet from Park Avenue, as a result of which appellant's permit was "invalid when issued and create[s] no rights in petitioner." The court rejected appellant's constitutional claims, and it dismissed the City's counterclaim as premature pending determination of an application by appellant for a zoning variance. No trial was held.

M. Appellant's Application for a Variance

In December of 1986, appellant commenced the procedural steps that are necessary prerequisites to an application to the BSA for a zoning variance. The application itself was filed in May of 1986. The BSA has been unable to hold a hearing on the application, however, because other municipal agencies have failed to complete their review of the draft environmental impact statement that appellant is required to submit to the BSA.

N. The Appeals in This Litigation, and Appellant's Preservation of the Questions to Be Reviewed

Appellant appealed to the Appellate Division from the decision by the court of first instance and, on that appeal, briefed its constitutional claims. By order dated April 2, 1987, the Appellate Division affirmed "for the reasons stated by" the lower court.

Appellant then appealed to the Court of Appeals pursuant to CPLR § 5601(b)(1), which authorizes such appeals "as of right" when the order appealed from "finally determines an action where there is directly involved the construction of the constitution . . . of the United States . . . ." Appellant briefed the constitutional issues in connection with the Court's *sua sponte* review of its subject matter jurisdiction. By order dated July 7, 1987, the Court of Appeals dismissed the appeal "upon the ground that no substantial constitutional question is directly involved."

On August 5, 1987, appellant moved in the Court of Appeals, pursuant to CPLR § 5602(a)(1)(i), for permission to appeal to that Court from the Appellate Division's order. On October 2, 1987, while that motion still was *sub judice*, appellant appealed to this Court, pursuant to 28 U.S.C. § 1257(2), from the order

of the Court of Appeals of July 7, 1987. That appeal was docketed on October 5, 1987. *Parkview Associates v. City of New York, et al.*, No. 87-542.

By order entered on October 20, 1987, the Court of Appeals granted appellant's motion for permission to appeal. That order brought up for review by the Court of Appeals "every reviewable issue" in the case, including the constitutional issues. *Quain v. Buzzetta Construction Corp.*, 69 N.Y.2d 376, 379 (1987). Therefore, in accordance with a stipulation of the parties, the appeal to this Court was dismissed on November 13, 1987.

Appellant briefed its constitutional claims on its appeal to the Court of Appeals, which, on February 9, 1988, affirmed the Appellate Division's decision. The Court held that "the original permit . . . was invalid" and that, therefore, "the . . . BSA action in ratifying the decision of the Commissioner partially revoking [the] permit had a sound legal basis" and, in fact, "there was no discretion reposed in" the Commissioner and the BSA "to do otherwise" than revoke the permit. The Court further held that "the City should not be estopped here from revoking that portion of the building permit," because "estoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws . . . even where there are harsh results . . . ."

As to appellant's constitutional claims, the Court's holding, in its entirety, was as follows:

> Finally, Parkview's claim that the City's action constitutes a taking without due process or just compensation may not be addressed in this action and at this time because Parkview had failed to apply for a variance (*see*, *Church of St. Paul v Barwick*, 67 NY2d 510, 519; *see also*, *Scarsdale Supply Co. v Village of Scarsdale*, 8 NY2d 325, 330; *Levitt, Inc. v Village of Sands Point*, 6 NY2d 269, 273). The variance application now pending is, of course, not affected by our decision today.

On April 28, 1988, reargument was denied.

The Questions Presented Are Substantial

I. The City's Revocation, After Appellant's Substantial Reliance, of a Permit Issued in Conformity With the City's Zoning Map Violates Due Process

The New York Court of Appeals has held in this case that the BSA and the Commissioner did not act irrationally in determining that the PI District's boundary is 150 feet from Park Avenue at 96th Street—a proposition of state law. In concluding, however, that the City was entitled to revoke appellant's permit notwithstanding appellant's substantial reliance thereon, the Court below embraced a proposition that is subject to this Court's review—*i.e.*, that appellant was charged at all times with knowledge of (and with the exercise of due diligence could have ascertained) the boundary's actual location.[3]

On the facts of this case, the proposition that appellant was charged with knowledge of the boundary's "correct" location is not consistent with due process. When subjected to scrutiny for conformance with constitutional standards, "an unfair and irrational exercise of state power cannot be transformed into a rational exercise merely by invoking a legal maxim or presumption." *Texaco, Inc. v. Short*, 454 U.S. 516, 544 (1982) (Brennan, J., dissenting).

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3 The language in the opinion of the Court of Appeals about "due diligence" must be regarded as an expression of the proposition that appellant was charged with knowledge of the boundary's "correct" location—not as a determination that appellant acted unreasonably in relying on the zoning map and its permit. The court of first instance and the Appellate Division (which adopted the lower court's reasoning) expressly refused to make findings as to the reasonableness of appellant's conduct, holding that it was irrelevant as a matter of law. Therefore, there were no lower court findings for the Court of Appeals to affirm on this issue, and as a matter of state constitutional law, the Court of Appeals had no jurisdiction to make its own findings. N.Y. Constitution, Art. 6, § 3; *see also* CPLR § 5501(b). No such finding, even if made, could deprive this Court of jurisdiction to consider appellant's constitutional claim. *See, e.g., United Gas Public Service Co. v. Texas*, 303 U.S. 123, 143 (1938); *Fiske v. Kansas*, 274 U.S. 380, 385-386 (1927).

A. Appellant May Not, Consistent With Due Process, Be Charged With Knowledge of the Boundary's "Correct" Location

To charge persons with knowledge of a particular law, due process requires that the government first comply with minimum prerequisites:

> Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.

Texaco, Inc. v. Short, *supra*, 454 U.S. at 532. *See also United States v. Locke*, 471 U.S. 84, 108 (1985); *Hodel v. Irving*, 107 S. Ct. 2076, 2091 (1987) (Stevens, J., concurring).

This Court also has recognized, however, "certain very limited circumstances in which . . . reliance on the maxim that a man may be presumed to know the law is not consistent with the restrictions imposed by the Constitution." *Texaco, Inc. v. Short*, *supra*, 454 U.S. at 545 (Brennan, J., dissenting), *citing Lambert v. California*, 355 U.S. 225, 228-229 (1957). There is, the same opinion observes, a "constitutional principle that reliance on the maxim of presumed knowledge of the law is limited by the reasonableness of applying that maxim in a particular class of cases." 454 U.S. at 549.

In the present case, it is unreasonable to charge appellant with knowledge of the location of the PI District's boundary. Appellant simply was denied "a reasonable opportunity to familiarize itself with [the law's] terms and to comply." *Texaco, Inc. v. Short*, *supra*, 454 U.S. at 532.

When appellant's permit was applied for and issued, not only appellant's architects, but also responsible municipal officials and hostile anti-development activists all thought that the boundary was *not* where the Court of Appeals now says that it always was. As drafted, the enabling legislation of March 3, 1983, was internally inconsistent, in that it incorporated a diagram that clearly showed the PI District's boundary to be 100 feet from Park Avenue at 96th Street. After the law's enactment, moreover, the responsible City agencies repeatedly and

systematically represented to the general public, to the City's own officials and to appellant in particular that the law was something different from what the Court of Appeals now has held it to be.

To recapitulate: (1) in 1983, after three public hearings, the Board of Estimate approved enabling legislation containing a diagram that had been certified by the City Planning Commission and approved by the relevant local community board, and that clearly depicted the PI District's boundary at 100 feet from Park Avenue at 96th Street; (2) the Department of City Planning, which had prepared both the enabling resolution and the certified diagram, thereafter revised zoning map 6b to show that boundary at 100 feet from Park Avenue; (3) in 1984, after more public hearings, the Board of Estimate approved additional enabling legislation containing a second diagram that had been certified by the City Planning Commission and approved by the community board, and that again clearly showed the boundary at 100 feet from Park Avenue; (4) the Department of City Planning thereafter again revised map 6b and continued the prior depiction of the boundary; (5) in the spring and summer of 1985, the Department of Buildings meticulously reviewed appellant's plans (which had been prepared on the basis of map 6b), concurred with appellant's architects as to the location of the PI District's boundary and, on August 12, 1985, approved the plans as conforming to all zoning requirements; and (6) in November of 1985, the Department of Buildings again reviewed appellant's plans and issued a building permit.

The reliance by appellant's architects and by everyone else (*i.e.*, the Department of Buildings as well as Civitas) on the zoning map is particularly telling and a testament to the authoritative nature of that document as an integral part of the Zoning Resolution. Since the initial enactment of the Zoning Resolution in 1961, the City has invited property owners to rely on the Zoning Resolution and has provided that document (and only that document) to the officials responsible for administering its zoning laws so that owners, architects and officials need not go back to the various prior actions of the Board of Estimate to ascertain what an owner can lawfully do with his land.

Indeed, it would be simply untenable if, instead of relying on the Zoning Resolution as published by the Department of City Planning, one seeking to design a lawful building had to review *all* relevant Board of Estimate enabling resolutions for *each of the hundreas of Zoning Resolution provisions* with which a building in New York City *must* comply.

In 1961, when the Zoning Resolution was enacted in its present form, the prior zoning statute was overhauled in its entirety. The legislative history of that revision makes clear that the present "one-map system" was devised because it "facilitates easy use of the proposed resolution," *i.e.*, the Zoning Resolution, and "replac[es]" the prior system, which was regarded as "cumbersome," with "a single set of maps *bound with the proposed resolution.*" *Zoning New York City*, p. viii (City Planning Comm'n 1958) (emphasis added). The new system was "designed primarily for the convenience of the potential developer who wants to find out what he can do on a particular plot of land . . . ." *Id.*

By providing for the compilation on published zoning maps of the changes effectuated by successive legislation, the legislators who enacted the Zoning Resolution in 1961 plainly sought to spare owners and their architects the burden and uncertainty of sifting through and comparing the successive "metes and bounds" descriptions contained in such legislation. They no doubt believed that they were promoting simplicity and certainty, and that they were sparing owners the need to retain counsel to ascertain what they could build.[4]

The basic standards of due process "require, among other things, that there be no question as to what actions an individual must take to protect his interests." *United States v. Locke*, *supra*, 471 U.S. at 116 (Powell, J., dissenting). Where, therefore, the applicable statute itself creates sufficient uncertainty, to premise a forfeiture on that statute "violate[s] the standard of certainty and definiteness that the Constitution requires."

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4 The City also has published a book entitled *Zoning Handbook: A Guide to the New York City Zoning Resolution*, which advises the public that "the district in which [any] project is located" may be identified "by referring to the appropriate map" (p. 87).

Id. at 116-117. In the present case, it violates these principles of due process to charge appellant with knowledge that the zoning map was inaccurate, or that the location of the PI District boundary was where it now, after the fact, has been held to be.

B. The City's Failure to Provide Appellant With Prompt Notice of the Map Change Further Violated Due Process

The injustice in the present case is compounded by the City's failure to give appellant prompt notice of the change to map 6b. The Department of City Planning published its revised map 6b in December of 1985, but no notice was given to the public, and no one took the trouble to ascertain whether any outstanding building permits might be affected by a change or clarification in the map's depiction of the PI District's 96th Street boundary. Appellant therefore received no notice of the map change until July of 1986. Under these circumstances, appellant surely cannot be charged, consistent with due process, with knowledge of the boundary's "correct" location during those crucial seven months.

Where a governmental agency is considering action that will affect one's rights adversely, due process requires "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). As owner of the Property, appellant was entitled to prompt notice of any change in the zoning applicable thereto. Indeed, pursuant to City Charter §§ 197-c(a) and 200(b), the Board of Estimate could not amend the PI District's boundaries without complying with strict notice and public hearing requirements. The Charter's establishment of these procedural safeguards itself demonstrates the legitimacy of an owner's expectation that the zoning applicable to his property will not be changed without notice. *See, e.g., Littlefield v. City of Afton*, 785 F.2d 596, 600 (8th Cir. 1986); *Parks v. Watson*, 716 F.2d 646, 656-657 (9th Cir. 1983); *Sixth Camden Corp. v. Township of Evesham*, 420 F. Supp. 709, 714, 727 (D.N.J. 1976).

Precisely what sort of notice due process requires depends in each case upon a balancing of governmental and individual interests. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 263-271 (1970). But this Court consistently has held, in a variety of contexts, that due process requires actual *personal* notice where the names and addresses of the persons who will be directly affected by contemplated action are easily ascertainable. *See, e.g., Tulsa Professional Collection Services, Inc. v. Pope*, 56 U.S.L.W. 4302 (U.S. Apr. 19, 1988); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 799 (1983); *Schroeder v. City of New York*, 371 U.S. 208, 211 (1962); *Mullane v. Central Hanover Bank & Trust Co., supra*, 339 U.S. at 318.

In the case at bar, appellant's substantial investment in the Property and in its building heavily outweighed the minimal inconvenience to the City that prompt notice of the map change would have entailed. Appellant's investment easily could have been protected by prompt notification of the change, because when the change was made, appellant had not yet incurred significant construction costs. Notice of the change would have given appellant an opportunity to contest it, or redesign its building and avoid the disaster that later befell it.

Furthermore, prompt notice to appellant of the change would *not* have compromised any legitimate municipal interest in the smooth administration of the zoning laws. The map change affected only one block in Manhattan (*i.e.*, 96th Street between Park and Lexington Avenues) and only two property owners (*i.e.*, appellant and the owner of the parcel directly across the street). The inconvenience to the City would have been miniscule.

The belated notice that appellant finally received in July of 1986, when its permit was revoked, was untimely and inadequate, because the permit revocation was premised upon prior action as to which appellant had received *no* notice. "It is . . . fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' " *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), *quoting from Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In

particular, due process requires that notice be provided "at a time when the deprivation [of property] can still be prevented." *Fuentes*, *supra*, 407 U.S. at 81. That did not happen here.

By reason of the City's failure to provide prompt notice, its subsequent revocation of appellant's permit was effectuated without due process. That revocation should be set aside.

II. The City May Not Shield Itself From the Requirements of Due Process by Claiming That Its Officials' Actions Are *Ultra Vires* and Immune From Principles of Equitable Estoppel

"Municipalities, of course, conduct much of their business of governing through human agents." *City of St. Louis v. Praprotnik*, 108 S.Ct. 915, 931 (1988) (Brennan, J., concurring). Therefore, this Court has held that local governments may be held responsible for injuries caused by their officials' violations of constitutional rights where those acts "may fairly be said to represent official policy . . . ." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). The decision below is not consistent with these basic principles.

The Zoning Resolution rivals the Internal Revenue Code in breadth and complexity. It has undergone countless amendments since its initial enactment in 1961; no owner could afford to develop his property were he required to examine each of the original legislative proceedings to ascertain how they affect his parcel. Nor does the City expect him to.

Appellant's permit was issued after a full examination of its building plans conducted in accordance with the regular procedures established by the City. It was issued by the officers who were charged with responsibility for reviewing plans and issuing permits and, in connection therewith, administering and interpreting the Zoning Resolution. When issued, that permit conformed with (and appeared to be based upon) a reasonable interpretation of the Zoning Resolution.[5]

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5 Indeed, had appellant's architects or the relevant municipal officials—or the activists who were looking over their shoulders—detected some issue that required reference to the underlying enabling legislation of

The City's subsequent determination that the PI District's boundary was not where its officials previously had thought it to be amounts to a new interpretation of the zoning laws applicable to appellant's project. In revoking appellant's permit, the City is giving that new interpretation retrospective effect. On the facts at bar, due process precludes the City from doing that.

The retroactive application of any rule or interpretation of law, whether legislative, judicial or regulatory, constitutes a deprivation of due process where the harshness and unfairness of retroactivity outweigh the public benefit—which is particularly the case where, as here, the affected persons have had no adequate opportunity to conduct their activities so as to comply with the new rule. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971); *Welch v. Henry*, 305 U.S. 134, 147 (1938); *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 389-390 (1932); *Blodgett v. Holden*, 275 U.S. 142, 147 (1927); *see also Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374 (1939).

The retroactive application of zoning legislation in particular is arbitrary and unreasonable, and therefore unconstitutional, where it operates to destroy substantial structures built prior to adoption of the legislation. The New York Court of Appeals articulated this fundamental principle more than 35 years ago in *People v. Miller*, 304 N.Y. 105 (1952), where it explained:

> It is the law of this state that noncomforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance. * * * The decisions are sometimes put on the ground that the owner has secured a "vested right" in the particular use—which is but another way of saying that the property interest affected by the particular

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the Board of Estimate, they are likely to have reached the same conclusion in view of the clarity with which the certified diagrams incorporated in the enabling legislation of March 3, 1983, and May 24, 1984, depicted the PI District's boundary at 96th Street.

> ordinance is too substantial to justify its deprivation in light of the objectives to be achieved by enforcement of the provision.

304 N.Y. at 107. *See also Dobbins v. City of Los Angeles*, 195 U.S. 223, 238-239 (1904); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982). More recently, New York's Court of Appeals has "recognized that [this] vested rights doctrine is conclusory, and indeed a fiction that 'hides many unmentioned considerations of fairness . . . .' " *Hodes v. Axelrod*, 70 N.Y.2d 364, 370 (1987), *quoting from Chrysler Properties, Inc. v. Morris*, 23 N.Y.2d 515, 518 (1969).

In the present case, however, the Court below determined that appellant's permit was not entitled to the protection of this "fiction" and, instead, the Court embraced another fiction—*i.e.*, the proposition that the permit was "invalid" when issued and conferred no rights whatsoever because the PI District's boundary actually was somewhere other than where zoning map 6b depicted it.

This Court has made it clear that States and localities may not rely on the fiction that a party never attained anything rising to the status of property as a justification for depriving that party of its constitutional rights. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 539 n. 4 (1985); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *Hughes v. Washington*, 389 U.S. 290, 296-297 (1967) (Stewart, J., concurring). Indeed, this Court has made clear that, although property rights and interests generally are created by "an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement" that is protected by the due process clause. *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 9 (1978).

In the zoning and land use context, the courts of the various States have modified the rigid concepts of traditional vested rights doctrine by enunciating equitable principles to grapple with the issues posed by owners' reasonable reliance on building permits that appeared to be valid when issued but subsequently

were disavowed. A leading commentator thus points out that, in "cases of 'honest error,' " where "a permit has been issued in good faith but is based upon an erroneous, though arguably correct interpretation of the zoning ordinance," courts have held that the "municipality is estopped from revoking the permit when the permittee has acted in reliance upon it." 3 Rathkopf, *The Law of Zoning and Planning* § 45.05[3][d] (4th ed. 1986).

In fact, an important early decision was written by Justice Brennan of this Court when he was a state court trial judge. *Kurowski v. Board of Adjustment*, 11 N.J. Super. 433, 78 A.2d 429, 433-434 (1951), cited with approval in the seminal decision of *Jantausch v. Borough of Verona*, 41 N.J. Super. 89, 124 A.2d 14, 16-18 (1956), *aff'd*, 24 N.J. 326, 131 A.2d 881 (1957). Since then, courts in at least fourteen States have held that estoppel can be available to preclude the revocation of a building permit where there has been substantial good faith reliance and the permit was not plainly invalid when issued.[6]

New York's Court of Appeals has now firmly rejected this approach, holding that this case is governed by earlier precedents (*see, e.g., City of Yonkers v. Rentways, Inc.*, 304 N.Y. 499, 504-505 [1952]) in which the Court determined that a building inspector's error in issuing a permit did not create an estoppel—even though in this case, unlike the earlier cases, the

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6 *See, e.g., Municipality of Anchorage v. Schneider*, 685 P.2d 94, 96 (Alaska 1984); *People v. Dep't of Housing and Community Development*, 45 Cal. App. 3d 185, 119 Cal. Rptr. 266, 273-275 (1975); *Zoning Comm'n of Sherman v. Lescynski*, 188 Conn. 724, 453 A.2d 1144, 1149 (1982); *City and County of Denver v. Stackhouse*, 135 Colo. 289, 310 P.2d 296 (1957); *O.P. Corp. v. Village of North Palm Beach*, 278 So.2d 593, 595 (Fla. 1973); *Cities Service Oil Co. v. City of Des Plaines*, 21 Ill.2d 157, 171 N.E.2d 605, 608 (1961); *Permanent Financial Corp. v. Montgomery County*, 308 Md. 239, 518 A.2d 123, 126-130 (1986); *Ridgewood Development Co. v. State*, 294 N.W.2d 288, 293 (Minn. 1980); *Murrell v. Wolff*, 408 S.W.2d 842, 851 (Mo. 1966); *J.E.D. Associates, Inc. v. Town of Danville*, 122 N.H. 234, 444 A.2d 493, 494 (1982); *Bonsall v. Township of Mendham*, 116 N.J. Super. 337, 282 A.2d 410, 414 (App. Div.), *cert. denied*, 59 N.J. 529, 284 A.2d 354 (1971); *Caporali v. Ward*, 89 Pa. Commw. 621, 493 A.2d 791, 793-794 (1985); *Town of Glocester v. Olivo's Mobile Home Court, Inc.*, 111 R.I. 120, 300 A.2d 465, 471 (1973); *Keller v. City of Bellingham*, 92 Wash.2d 726, 600 P.2d 1276, 1279-1280 (1979).

building inspectors did not make any errors but acted in conformity with the City's official zoning map.[7] Due process is offended, however, by governmental action that contravenes a basic sense of justice. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 502-507 (1977); *Examining Board of Engineers v. Flores de Otero*, 426 U.S. 572, 602 (1976); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Rochin v. California*, 342 U.S. 163, 173 (1951).

This Court has recognized that there are circumstances in which due process precludes the government from repudiating the apparently authoritative actions of its own officials. Thus, in *Cox v. Louisiana*, 379 U.S. 559 (1965), the Court held that the defendant's criminal conviction under a statute that prohibited demonstrations "near" a courthouse was not consistent with due process where the defendant had relied on local police officials' advice that his group could assemble across the street. According to this Court, the statute "fore[saw] a degree of on-the-spot administrative interpretation by officials charged with responsibility for administering it and enforcing it," so that the on-the-spot interpretation on which the defendant had relied was not a "waiver of law . . . beyond the power of the police." 379 U.S. at 568-569. *See also United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973). There, this Court recognized a defense of reliance where the defendant was "affirmatively misled" by "longstanding, official administrative construction" of a statute. 411 U.S. at 670. The Court concluded that the defendant had been "deprived . . . of fair warning" as to the conduct proscribed, so that "there can be no doubt that traditional notions of fairness" prevented the government from proceeding with the prosecution. *Id.* at 674.

These principles apply here. Appellant faces an enormous forfeiture even though at all times it proceeded in accordance with what the law appeared to be, as interpreted and codified by the Department of City Planning, and as interpreted and administered by the Department of Buildings in the course of its formal examination of appellant's plans. The Zoning Resolution is a statute that requires day-to-day, practical enforcement.

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7 *See also E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 369-371 (1988), decided by the Court of Appeals simultaneously with this case.

Given the statute's complexity, owners and their architects must rely on the Zoning Resolution (*i.e.*, on the 900-page looseleaf version, including the 125 maps contained therein, published by the Department of City Planning); it is the only document that the City itself provides to the officials at the Department of Buildings who are charged with the duty of administering the statute.

Unless clearly erroneous, these officials' interpretations of the Zoning Resolution are entitled to a presumption of regularity. The City may not disavow them *in toto* where, as here, they are not patently unreasonable, they are consistent with a zoning map prepared by the City itself and incorporated in the ordinance, they also are consistent with a certified diagram incorporated in the underlying enabling legislation, and there has been substantial good faith reliance. The contrary conclusion that has been sanctioned below is not consistent with due process.

III. Appellant's Due Process Claim Is Ripe and Should Have Been Adjudicated Below

By affirming the Appellate Division's order and declining to adjudicate appellant's due process claim on the ground that it is premature, the highest court in New York in effect has decided adversely to appellant federal constitutional questions of substantial importance.

Appellant's claim is ripe. In concluding otherwise, the Court of Appeals relied exclusively on New York cases holding that a constitutional attack on a zoning ordinance as confiscatory cannot be adjudicated until a variance has been sought. This Court has articulated a similar rule in cases challenging land use regulations as takings without compensation. *See, e.g., MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561, 2566-2569 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-191 (1986).

But the rule has not been applied to due process claims. This Court has adjudicated such claims even in cases in which taking claims were premature. *See Pennell v. City of San Jose*, 108 S. Ct. 849, 857-859 (1988); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 293-304 (1981); *see also Her-*

rington v. County of Sonoma, 834 F.2d 1488, 1497-1499 (9th Cir. 1988). Indeed, the rule's rationale—*i.e.*, that it is not until available administrative remedies have been pursued that the courts can determine whether a regulation's interference with an owner's use of his property is so substantial that it amounts to a taking—does not apply to, and makes no sense in the context of, due process claims like those here.[8]

Appellant does not challenge the hypothetical future effect of zoning legislation, but the actual application to it of specific statutory provisions that already have served to deprive it of property. It had expected to complete the project and sell its condominium units by the spring of 1987. Instead, construction above the 19th floor has been halted since 1986, and appellant cannot obtain a certificate of occupancy for even the lower 19 floors until the top twelve floors are either removed or legalized and completed. In the meantime, the Property generates no income whatsoever, carrying charges continue and construction costs increase. The New York courts have responded by relegating appellant to the uncertainties of a variance application that is likely to lead to further litigation, regardless of the outcome.

No variance, even if granted, can undo or even ameliorate the enormous injuries already suffered by appellant, which will not be made whole. Appellant's injuries, resulting as they do from governmental land use regulation, no longer can be regarded as merely a business risk inherent in the ownership of private property. *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S.Ct. 2378, 2388-2389 (1987).

The Court of Appeals was wrong to refuse to decide whether the deprivation to which appellant already has been subjected was effectuated without due process. Its erroneous refusal to address this question on the merits is the equivalent, for purposes of 28 U.S.C. § 1257(2), of an erroneous rejection of appellant's claim. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 290-291 n. 3 (1973); *Williams v. Kaiser*, 323 U.S. 471, 478 (1945); *Lawrence v. State Tax Commission*, 286 U.S. 276, 282-

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8 Appellant concedes that a claim that the City's actions constitute a taking without compensation is premature pending determination of its variance application.

283 (1932). Therefore, this Court has jurisdiction to hear this case and decide appellant's claim.

Conclusion

Under the guise of revoking a permit that supposedly never was valid (even though it was reviewed repeatedly by the competent authorities and conformed to the official zoning map, which, in turn, was consistent with a diagram certified by the City Planning Commission and incorporated in the underlying enabling legislation), the City of New York is subjecting appellant to grotesque mistreatment. The City has violated appellant's right to due process of law, and the decision below should be reversed.

May 9, 1988

Respectfully submitted,

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Counsel for Appellant

Of Counsel:
Hector Torres
Audry Weintrob

Appendix 1

Order (Remittitur) of the Court of Appeals of the State of New York, dated and filed February 9, 1988

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Sol Wachtler, Chief Judge, Presiding

No. 23

In the Matter of

PARKVIEW ASSOCIATES,

Appellant,

v.

CITY OF NEW YORK, et al.,

Respondents,

and

CIVITAS CITIZENS, INC.,

Intervenor-Respondent.

The appellant in the above entitled appeal appeared by Rosenman & Colin, Esqs.; the respondents appeared by Hon. Peter L. Zimroth, Corporation Counsel; Berle Kass & Case, Esqs.; and the *amici curiae* appeared by Golenbock and Barell, Esqs.; Marc Silver, Esq.; Jeremiah Gutman, Esq. and Martin Gallent, Esq.

The Court, after due deliberation, orders and adjudges that the order affirmed [*sic*], with costs. Opinion by Judge Bella-

cosa. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone and Hancock concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ DONALD M. SHERAW

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, February 9, 1988.

Appendix 2

Opinion of the Court of Appeals of the State of New York, dated and filed February 9, 1988

STATE OF NEW YORK
COURT OF APPEALS

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 23

In the Matter of

PARKVIEW ASSOCIATES,

Appellant,

v.

CITY OF NEW YORK, et al.,

Respondents,

and

CIVITAS CITIZENS, INC.,

Intervenor-Respondent.

Jeffrey L. Braun, Hector Torres & Audry Weintrob, NY City, for appellant.

Peter L. Zimroth, NYC Corporation Counsel (Phyllis Arnold & Elizabeth S. Natrella of counsel) for respondent City of NY.

Robert S. Davis & Karl S. Coplan, NY City for respondent Civitas.

BELLACOSA, J.:

We hold in this case involving the height of a building on Park Avenue in Manhattan, already constructed in excess of the height limitations of applicable zoning provisions, that estoppel is not available to preclude a governmental entity from discharging its statutory duties or to compel ratification of prior erroneous implementation in the issuance of an invalid building permit. The rare exception to the unavailability of estoppel against governmental entities may not, in any event, be invoked in this case where reasonable diligence by a good faith inquirer would have disclosed the true facts and the bureaucratic error. We may not address the additional claim that governmental correction of prior administrative action, erroneously overriding applicable zoning provisions, constitutes an unconstitutional taking inasmuch as there is a pending variance application. We thus affirm the Appellate Division's order affirming the denial of relief to plaintiff.

Owner-builder Parkview's property, purchased in 1982, is at the southeast corner of Park Avenue and 96th Street, located 90 to 190 feet east of Park Avenue. A portion of the property is within a Special Park Improvement District (P.I.D.) created by enactment of the Board of Estimate of the City of New York in 1973. The enabling and authorizing resolution limits the height of new buildings in that district to 19 stories or 210 feet, whichever is less. The P.I.D. boundary ran uniformly 150 feet east of Park Avenue until by resolution of the Board of Estimate on March 3,1983, the metes and bounds description of the P.I.D. was amended, providing in part for a reduction from 150 to 100 feet between East 88 Street to midway between 95th and 96th Streets. The boundary north of this midblock division, pursuant to the metes and bounds, remained at all times 150 feet. Plaintiff's property was thus unaffected by this 1983 change and has always been governed by the 1973 original enactment.

Zoning map 6-b accompanying the March, 1983 resolution depicted the amended boundary with a dotted line which fell within a shaded area constituting the existing P.I.D. A numerical designation of "150", included on earlier versions of the

map to show the setback, had been removed and a new designation of "100" was inserted adjacent to the dotted line. This left no numerical designation along the northern part of the boundary. The "150" designation signaling the retention of the boundary north of the 95th-96th Street midblock line was reinserted on a version of map 6-b published to reflect a subsequent resolution of September 19, 1985.

Parkview's initial new building application, submitted on June 5, 1985, was rejected for failure to show compliance with the P.I.D. height limitation. Based upon its interpretation of the version of zoning map 6-b existing in the summer of 1985, Parkview concluded that a 100 foot boundary controlled, and its revised building application, submitted on July 31, 1985, limited the height of the proposed new building to 19 stories between its property line and 100 feet from Park Avenue. The portion of the building setback more than 100 feet from Park Avenue was to rise 31 stories. The application was approved by the Department of Buildings as conforming with all zoning requirements on August 12, 1985 and, after re-review, a building permit was issued on November 21, 1985 by the Borough Superintendent. There is no dispute that at the time the permit was issued the Department erroneously intepreted amended map 6-b as changing the boundary on 96th Street to 100 feet. On July 11, 1986, however, after substantial construction, the Borough Superintendent of the Department of Buildings issued a stop work order for those portions of the building over 19 stories within the full 150 feet of Park Avenue. After review, the Commissioner of Buildings partially revoked the building permit, consistent with the stop work order, on the grounds that the permit, to the extent it authorized a height of 31 stories from 100 feet back instead of 150 feet back, was invalid when issued.

Parkview appealed the Commissioner's decision to the Board of Standards and Appeals (BSA), which denied the appeal and sustained the determination of the Commissioner. In sum, the BSA found that the dotted lines on zoning map 6-b within the shaded P.I.D., expressly connoting a reduction to 100 from 150 feet of the protected area, excluded the 96th Street frontage of plaintiff from any change; that the original resolution with its

metes and bounds description, which was never changed in any event, controlled over the map depicting the boundaries even if the map could be misread; and that the boundary-height limitation applicable to Parkview under the metes and bounds description was and had always been 150 feet east of Park Avenue.

Parkview then turned to the courts, essentially in an article 78 proceeding, seeking to set aside the partial revocation of its building permit. It sought to reinstate the full permit, arguing that the final BSA determination was arbitrary and capricious or affected by error of law because the original permit was properly issued; that its rights pursuant to that permit had vested; that its reliance on the permit caused substantial and irreparable harm requiring that the City be estopped from revoking the permit; and that the partial revocation deprived Parkview of its property without due process or just compensation.

Special Term dismissed the petition holding that the BSA's determination was reasonable and supported by substantial evidence that the building permit was invalid when issued, vesting no rights, because the building plans did not comport with the metes and bounds description for the P.I.D. as contained in the controlling original legislative enactment of the Board of Estimate. The court also held that estoppel was unavailable as a matter of law. Finally, the constitutional taking argument was dismissed as premature because Parkview had failed to apply for a variance which is a prerequisite to that claim. The Appellate Division affirmed without opinion, and this appeal ensued by leave of this Court.

Parkview argues that its original permit was issued in conformity with a reasonable interpretation of the zoning map, thus making it valid when issued; that the principles of equitable estoppel preclude the partial revocation of the building permit even if the permit was erroneously issued; and that the City's partial revocation of its permit constitutes a taking in violation of due process of law and without just compensation. The City counters that the decision of the BSA has a rational basis because the permit was invalid when issued; that equitable

estoppel is not available to estop a municipality from enforcing its zoning laws when the building permit issued by the municipality violated those zoning laws; and that the petition below failed to state a claim for an unconstitutional taking.

There can be little quarrel with the proposition that the New York City Department of Buildings has no discretion to issue a building permit which fails to conform with applicable provisions of law, and that the Commissioner may revoke a permit which "has been issued in error and conditions are such that a permit should not have been issued" (Administrative Code of the City of New York §§ 27-191, 27-197). Since discrepancies between the map and enabling resolution are controlled by the specifics of the resolution (New York City Zoning Resolution §§ 11-22, 12-01), the original permit in this case was invalid inasmuch as it authorized construction within the 150 foot P.I.D. above 19 stories in violation of New York City Zoning Resolution § 92-06 (Journal of Proceedings of the Board of Estimate of the City of New York, Vol. II, p 1708 [Cal. No. 6, April 23, 1973], as amended [Cal No. 8, March 3, 1983]). Therefore, the subsequent BSA action in ratifying the decision of the Commissioner partially revoking Parkview's permit had a sound legal basis. Indeed, there was no discretion reposed in these authorities to do otherwise at that point and on the record before them at that time.

Turning to the next stage of our analysis, we have only recently once again said that "[g]enerally estoppel may not be invoked against a municipal agency to prevent it from discharging its statutory duties" (*Scruggs-Leftwich v Rivercross Tenant's Corp.*, ____ NY2d ____ [slip opn 11-19-87, at 3], *citing Daleview Nursing Home v Axelrod*, 62 NY2d 30, 33; *M/O Hampton's Hospital and Medical Center v Moore*, 52 NY2d 88, 93; *see also*, *EFS Venture Corp. v Foster*, ____ NY2d ____ [slip opn, decided today]). Moreover, "[e]stoppel is not available against a local government unit for the purpose of ratifying an administrative error" (*Morley v Arricale*, 66 NY2d 665, 667). In particular, "a municipality, it is settled, is not estopped from enforcing its zoning laws either by the issuance of a building permit or laches" (*City of Yonkers v Rentways, Inc.*, 304 NY

499, 505) and "[t]he prior issue to petitioner of a building permit could not 'confer rights in violation of the zoning laws' " (*B & G Construction Corp. v Bd. of Appeals*, 309 NY 730, 732, *citing City of Buffalo v Roadway Transit Co.*, 303 NY 453, 463). Insofar as estoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results (*Parsa v St. of NY*, 64 NY2d 143, 147; *City of NY v City Civil Service Comm*, 60 NY2d 436, 448-449), the City should not be estopped here from revoking that portion of the building permit which violated the long-standing zoning limits imposed by the applicable P.I.D. resolution. Even if there was municipal error in one map and in the mistaken administrative issuance of the original permit, those factors would be completely outweighed in this case by the doctrine that reasonable diligence would have readily uncovered for a good faith inquirer the existence of the unequivocal limitations of 150 feet in the original binding metes and bounds description of the enabling legislation, and that this boundary has never been changed by the Board of Estimate. The policy reasons which foreclose estoppel against a governmental entity in all but the rarest cases thus have irrefutable cogency in this case.

Finally, Parkview's claim that the City's action constitutes a taking without due process of law or just compensation may not be addressed in this action and at this time because Parkview had failed to apply for a variance (*see*, *Church of St. Paul v Barwick*, 67 NY2d 510, 519; *see also*, *Scarsdale Supply Co. v Village of Scarsdale*, 8 NY2d 325, 330; *Levitt, Inc. v Village of Sands Point*, 6 NY2d 269, 273). The variance application now pending is, of course, not affected by our decision today.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

* * *

Order affirmed, with costs. Opinion by Judge Bellacosa. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone and Hancock concur.

Decided February 9, 1988

Appendix 3

Order of the Appellate Division (First Judicial Department) of the Supreme Court of the State of New York, dated and filed April 2, 1987

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 2, 1987

PRESENT—HON. FRANCIS T. MURPHY, *Presiding Justice*
LEONARD H. SANDLER
JOHN CARRO
SIDNEY H. ASCH
ERNST H. ROSENBERGER, *Justices.*

29639

In the Matter of the Application of

PARKVIEW ASSOCIATES,

Petitioner-Appellant,

For Judgment pursuant to CPLR Article 78

—against—

CITY OF NEW YORK, COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK and BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK,

Respondents-Respondents,

—and—

CIVITAS CITIZENS, INC.,

Intervenor-Respondent-Respondent.

An appeal having been taken to this Court by the petitioner-appellant from a judgment of the Supreme Court, New York County (William McCooe, J.). entered on or about November 25, 1986,

And said appeal having been argued by Jeffrey L. Braun, Hector Torres, Audry Weintrob and Doron Goldman of counsel for appellant, by Elizabeth S. Natrella, Pamela Seider Dolgow and Phyllis Arnold of counsel for respondents-respondents, by Robert S. Davis and Karl S. Coplan of counsel for intervenor respondent-respondent, by John R. Low-Beer and Martin Gallent of counsel for Carnegie Hill Neighbors, The Friends of the Upper East Side Historic Districts, The Goat Hill Association, Landmark West, The Lenox Hill Neighborhood Association, The Municipal Art Society of New York, Sutton Area Community, Inc., The Union Square Park Community Coalition, Inc., and The Yorkville Civic Council as Amici Curiae, and by Charles G. Moerdler, Curtis C. Mechling and Mary J. Fahey of counsel for Associated Builders & Owners of Greater New York and Real Estate Board of New York, as Amici Curiae; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same hereby is affirmed for the reasons stated by McCooe, J., without costs and without disbursements.

ENTER:

s/ HAROLD J. REYNOLDS
Clerk.

Appendix 4

Decision and Judgment of the Supreme Court of the State of New York, County of New York, dated November 18, 1986, and filed November 23, 1986

SUPREME COURT—NEW YORK COUNTY
IAS—PART 8

Index No. 23977/86

#29 10/30/86

In the Matter of the Application of

PARKVIEW ASSOCIATES,

Petitioner,

For judgment pursuant to CPLR Article 78

—against—

CITY OF NEW YORK, COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK and BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK,

Respondents,

—and—

CIVITAS CITIZENS, INC.,

Intervenor-Respondent.

McCOOE, J.:

This is an Article 78 proceeding in the nature of a certiorari to review a determination of the Board of Standards and Appeals (BSA) which denied petitioner's appeal and sustained a deter-

mination of the Commissioner of Buildings which partially revoked petitioner's building permits based on a zoning violation and to mandamus the respondents to reinstate the building permits in their entirety. Petitioner further seeks a determination that the zoning regulations have been applied to it in an unconstitutional manner. The permits were issued by the Buildings Department (Department) based upon an inaccurate amended Zoning Map (Map 6b) which deviated from a 1973 Resolution of the Board of Estimate (BOE) creating a Special Parks Improvement District (District) limiting the construction of buildings within the District to the lesser height of 19 stories or 210 feet. Petitioner has constructed a 31 story building at 108 East 96th Street which is partially within the District, allegedly in a good faith reliance on amended Map 6b and seeks reinstatement of the full building permit to legalize the building as constructed.

The District was created in 1973 by a Resolution of the BOE which defined its geographical boundaries and height restrictions for new construction. The Resolution set the District boundary on East 96th Street at 150 feet east of Park Avenue. Petitioner acquired the subject property in 1982 which partially extended into the District. A 1983 BOE Resolution amended the District boundaries by reducing it from 150 feet to 100 feet east of Park Avenue from 88th Street to the midblock between 95th and 96th Street but left unchanged the 150 foot boundary from Park Avenue on East 96th Street where the subject property is located. The revised zoning map, amended Map 6b, inaccurately reflected a 100 foot rather than a 150 foot east boundary on East 96th Street. The 100 foot restriction is reflected by the absence of a distance marking, which under the applicable zoning law, means 100 feet from the nearest street.

Petitioner applied for and was issued building permits in 1985 by the Department which approved the plans for a 31 story building based on amended Map 6b which indicated a 100 foot rather than a 150 boundary on East 96th Street. There is no factual issue that the Department interpreted amended Map 6b as having a 100 foot boundary on East 96th Street. Work commenced on the building and on July 11, 1986 the Department

issued a stop work order based on the height violation of the zoning resolution. Petitioner has substantially completed a 31 story building at a cost exceeding $7.2 million.

Petitioner presents two principal arguments in support of its application. First, it contends that the permits were lawful when issued since the zoning law in dispute was amended Zoning Map 6b published by the Department of City Planning. Secondly, it contends that in any event the respondents should be estopped from asserting to the contrary since they published the inaccurate Map and petitioners relied on the Map in good faith. It contends that it could have constructed a building on the site conforming to the zoning regulation if there was no error.

Petitioner in support of its first contention particularizes its arguments and its interpretation of the controlling law as follows. Petitioner contends that amended Map 6b is the statute and that its unambiguous marking of the zoning district Map controls, citing Matter of Mahoney, N.Y.L.J., Oct. 15, 1979, p. 12, col. 1, and that no further examination of legislative history need take place. Sega v. State, 60 N.Y.2d 183, 191. It further contends that the Board of Estimate resolution is simply legislative history. Petitioner in advocating the primacy of amended Map 6b enunciates two canons of construction in zoning cases. First, that zoning regulations must be strictly construed against the municipality enacting them. Matter of Allen v. Adami, 39 N.Y.2d 275, 277; Bayswater Health v. Karagheuzoff, 37 N.Y.2d 408; FGL & L Prop. Corp. v. City of Rye, 66 N.Y.2d 111. Second, that zoning boundaries be sufficiently definite by referring to zoning ordinances and zoning maps without resorting to extrinsic evidence. Keeney v. Village of Le Roy, 22 A.D.2d 159, 162. Petitioner states that in interpreting amended Map 6b Zoning Resolution, Sec. 76-131 governs and provides that where "no dimensions are shown, such boundary line shall be considered . . . (c) . . . 100 feet from the nearest street within the district". Petitioner questions respondents' interpretation of the October 25, 1982 diagram accompanying the Board of Estimate March 3, 1983 resolution, arguing as to the relative weight of dotted lines and shading thereon.

Petitioner in support of its second principal contention alleges its good faith reliance upon the building permits and substantial construction to demonstrate vested rights and to invoke an estoppel against the respondents. Lefrak Forest Hills Corp. v. Galvin, 40 A.D.2d 211, aff'd 32 N.Y.2d 796; Bender v. New York City HHC, 38 N.Y.2d 662 as well as numerous authorities hereinafter considered. Petitioner cites Jim Davis Devel. Corp. v. Town of Brookhaven, N.Y.L.J., March 2, 1973, p. 20, col. 8, aff'd 42 A.D.2d 705, wherein the building inspector revoked permits after a substantial investment in construction by petitioner and Matter of Harney, N.Y.L.J., Oct. 30, 1984, p. 14, col. 1, in which estoppel was found against the Landmark Preservation Commission whose historic district designations had not been included in the Building Department records. Petitioner contends that if ambiguity existed in amended Map 6b, both respondents, as well as petitioner, had the duty to inquire further, citing Admin. Code, Sec. C26-108.6 for Building Department responsibility.

Intervenor-respondent Civitas Citizens, Inc. opposes the petition, urging that the 150 feet restriction on East 96th Street was unaffected by the March 3, 1983 Board of Estimate resolution, which was unambiguous, and that petitioner's contrary position is based upon speculation as to what the Board understood to be the effect of the resolution. Intervenor contends that the general rule of the unavailability of estoppel against a municipality should be applied and that no vested rights can arise from an illegal building permit. Intervenor distinguishes a series of cases wherein vested rights arise when a developer performs construction work in reliance on a valid permit and a subsequent change in the zoning ordinance renders the structure illegal.

The determination of the BSA is affirmed and the petition is dismissed. Respondent Department properly revoked in part the permits it had previously erroneously issued since the original approval was unauthorized under New York City Administrative Code ("Admin. Code"), Sec. C26-118-1 when there was a failure to conform to the zoning law. Citizens for the Preservation of Windsor Terrace v. Smith, [122 A.D.2d 827]. Admin.

Code, Sec. C26-118-7 authorizes the revocation of permits issued in error. The permits were invalid when issued and create no rights in petitioner. The controlling legislative act is the metes and bounds description in the Resolution, City of Utica v. Paternoster, 64 Misc.2d 749, 751, rather than the subsequently printed and erroneous amended Map 6b, which "is simply a supplementary graphic representation," Deans v. West, 203 N.W.2d 504, and only some evidence of the actual zoning. Wainwright v. City of Wheat Ridge, 558 P.2d 1005. The diagram dated October 25,1982 presented to the BOE on March 3, 1983 shows by dotted line that the revised boundary of the District only extended to the 95-96th Street midblock. Even if the diagram were unclear, or supported petitioner's position, the metes and bounds description retaining the 150 feet boundary on East 96th Street would control. People v. Mobil Oil Corp., 48 N.Y.2d 192, 199-200; Matter of Prospect v. Cohalan, 109 A.D.2d 210, 216, aff'd 65 N.Y.2d 867. The zoning resolution itself is sufficiently descriptive to embody the legislative intent. Matter of PHVT Corp. v. McGuire, 58 Misc.2d 159; Soron Realty v. Town of Geddes, 23 A.D.2d 165. Furthermore, the 1983 version of the BOE Resolution advocated by petitioner would be invalid since it fails to conform to ULURP procedures for amending the 1973 Resolution. The Resolutions of the BOE are the legislation and control.

The relationship of the Board resolution to the zoning map is analogous to an inconsistency between a federal statute and its published codification where the former controls. United States v. Welden, 377 U.S. 95, 98, n. 4. See also People v. Hartwell, 166 N.Y. 361. Petitioner's contention that the silence of amended Map 6b as to the dimensions of the boundary on East 96th Street should result in an interpretation of 100 feet is unavailing since Zoning Resolution, Sec. 76-131(c) dictates such a result only where, unlike the present case, in the Board resolution itself "no dimensions are shown". In any event since the zoning map is not the statute, the interpretive language is ineffective. Matter of Colony Park v. Malone, 25 Misc.2d 1072, 1076. Matter of Mahoney, supra, relied upon by petitioner, is distinguishable in that the Town in that case was unable to clar-

ify the discrepancy between 1929 and 1966 zoning maps. Petitioner's reliance on authorities holding that ambiguities are to be resolved in favor of the property owner where, as here, there is no ambiguity is misplaced.

Respondent BSA's determination sustaining the partial revocation by respondent Commissioner of petitioner's permits has a reasonable basis in the record and in law and this Court must sustain such a construction of a statute by the administering agency. John P. v. Whelan, 54 N.Y.2d 89, 95-96; Bernstein v. Toia, 43 N.Y.2d 437, 448; Howard v. Wyman, 28 N.Y.2d 434. Even if the Court were not to apply the arbitrary and capricious standard and apply the standard of review sought by petitioner treating the petitioner as raising purely an issue of statutory construction under Kurcsics v. Merchants Mutual Life Ins. Co., 49 N.Y.2d 451 and afford little deference to the agency interpretation, the result would not be affected.

Petitioner's second principal contention is that it acquired vested rights and seeks to invoke an estoppel against respondents. The distinction between permits validly issued and thereafter revoked and permits invalidly issued and thereafter revoked is crucial to this issue. Vested rights of a property owner are those which, after an acquisition, may not be extinguished by government action. Reichenbach v. Windward at Southampton, 80 Misc.2d 1031, 1038, aff'd 48 A.D.2d 909, app. dism. 38 N.Y.2d 912. Vested rights do not arise from invalidly issued building permits. Perrotta v. City of New York, 107 A.D.2d 320, aff'd 66 N.Y.2d 859; Natchev v. Klein, 41 N.Y.2d 833; Albert v. Board of Standards and Appeals, 89 A.D.2d 960, app. dism. 59 N.Y.2d 673.

Petitioner cannot under the present circumstances invoke an estoppel against the municipal respondents. Public Impvts. Inc. v. Board of Education, 56 N.Y.2d 850; Hamptons Hospital v. Moore, 52 N.Y.2d 88. In Perrotta v. City of New York, supra, this rule was applied in a zoning matter after the petitioner had performed substantial construction following the issuance of a void permit which was subsequently revoked. The determinations in both Perrotta and in Albert, supra, were without prejudice to petitioner's right to apply for a variance. In Re Van

Wagner Advtg., N.Y.L.J., July 16, 1986, p. 11, col. 1, Sup. Ct., N.Y. Co., involved a review of a refusal by BSA to grant an area variance in which the Court refused to invoke estoppel against the City which had revoked illegal permits in spite of the performance of construction work.

Respondents factually question the good faith of petitioner since it acquired the property when the original Map 6b was controlling, its failure to examine the Resolutions which was its principal responsibility rather than of respondents, its charged knowledge that ULURP would have required community consideration and finally respondents' claim that a further amended map reflecting zoning changes as of September 19, 1985 indicated the "150" foot restriction in the subject area.

It is unnecessary to consider the factual issues as to the good faith reliance by petitioner since an estoppel against respondents is unavailable as a matter of law. Petitioner relies upon Faymor v. Board of Standards and Appeals, 45 N.Y.2d 560 and Matter of Harney, supra, both of which are distinguishable. In Faymor, unlike the present case wherein respondents acted in good faith, the permits had been initially lawfully issued and were revoked arbitrarily by the City, as part of a pattern of misconduct which supported the estoppel invoked by the Court. Harney involved an estoppel against the Landmarks Preservation Commission in a case where the records of the Building Department issuing the permit were silent as to historic district designations. Additional authorities cited by petitioner are also unavailing to invoke estoppel against respondents. In Lefrak Forest Hills Corp. v. Galvin, supra, the permits were legal when issued and extended and the holding involved the arbitrariness of a BSA denial of further extension rather than an estoppel. Similarly in Jim Davis Devel. Corp. v. Town Board, supra, petitioner prevailed since the permits were legal when issued and rendered illegal by a subsequent change in the law, as was also the case in Landmark Colony v. Board of Supervisors, 113 A.D.2d 741. Each of petitioner's other citations also misses the mark. Neither Eden v. Board of Trustees, 49 A.D.2d 277 nor Bender v. New York HHC, supra, involved building permits and each were limited to their individual facts. In Bender this

limitation was expressly set forth by the Court in Hampton Hospital v. Moore, supra. Scruggs-Leftwich v. Rivercross Tenants Corp., [119] A.D.2d [88] and 1555 Boston Road Corp. v. Fin. Admr., 61 A.D.2d 187 were unrelated to zoning and involved arbitrary changes in government policy. In the absence of allegations supporting either the ripening of vested rights or an estoppel, petitioner's claims based on vested rights and estoppel must be dismissed.

The final claims in the petition allege State and Federal claims of an unconstitutional taking or deprivation of property by virtue of the application of the zoning resolutions as to District height limitations to petitioner's property. However, an application to respondent for a variance pursuant to its power under Zoning Resolution, Sec. 72-21 and NYC Charter, Sec. 666, is a condition precedent to such claims. Euclid v. Ambler Realty Co., 272 U.S. 365; Scarsdale Supply Co. v. Village of Scarsdale, 8N.Y.2d 325, 330; Levitt v. Incorp. Village of Sands Point, 6 N.Y.2d 269, 273. Since the ordinance is otherwise valid and reasonable, an administrative application may save its constitutionality, St. Basil's Church v. Kerner, 125 Misc. 526, and judicial review is premature. Incorp. Village of Upper Brookville v. Faraco, 282 App. Div. 943, 944, aff'd 307 N.Y. 642. In any event the enforcement of the District height limitation does not give rise to an unconstitutional taking which is defined in French Investing Co. v. City, 39 N.Y.2d 587, 594-596, as a restriction rendering the property "unsuitable for any reasonable income productive or other private use for which it is adapted and thus destroy its economic value, or all but a bare residue of its value". The Due Process clause does not protect against the denial of one use and the property in question may be utilized as a 19 story building, or reconfigured, or sold. Andrus v. Allard, 444 U.S. 51; Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 468. Since the petition fails to state either a State or Federal constitutional claim they are dismissed.

Petition dismissed. There is no relief requested as to the counterclaim which in any event would be premature before the variance issue is decided.

This is the Decision and Judgment of the Court.

Dated: November 18, 1986

s/ WILLIAM P. MCCOOE
J.S.C.

Appendix 5

Resolution of the Board of Standards and Appeals of the City of New York, dated October 14, 1986, and filed October 15, 1986

BSA CAL. 705-86-A
Premises: 108 East 96th Street
Dated: October 14, 1986

WHEREAS, this application requests a determination that the Department of Buildings was in error in revoking the building permit issued for these premises on the basis that a substantial portion of the lot falls within the Special Park Improvement (PI) District; and

WHEREAS, the applicant has argued that the boundary line of the PI District is located 100 feet east of Park Avenue along 96th Street as indicated on a map accompanying an amendment of the District boundary lines adopted by the Board of Estimate March 3, 1983; and

WHEREAS, the applicant has argued that subsequent to that 1983 action, maps printed in the volumes of the Zoning Resolution which were sold to the public, indicated the boundary of the district to be 100 ft.; and that such maps were the basis of the issuance of the building permit in November of 1985; and

WHEREAS, the applicant has argued further that the inclusion of the small notation of "150" to denote the width of the PI District on East 96th Street, included in the December 1985 publication of the Zoning Resolution, was an erroneous and invalid amendment of the district, not properly adopted under Charter-defined procedures; and

WHEREAS, the record indicates that prior to March 3, 1983, the width of the PI District on East 96th Street was 150 ft.; and

WHEREAS, the record indicates that on March 3, 1983, the Board of Estimate adopted a Resolution which described in terms of metes and bounds the boundaries of the PI District, making certain changes in the width of the district at various

streets but making no change to the boundary line located 150 feet from the Park Avenue intersection on East 96th Street; and

WHEREAS, although the applicant has argued that an accompanying map published by the City Planning Commission on October 25, 1982 and included in the Board of Estimate calendar of March 3, 1983 indicated "shading" of uniform width at all intersections covered by the PI District; that map also contained dotted lines indicating those intersections at which boundary line changes were being made and excluded the 96th Street frontage from the areas marked by dotted lines; and

WHEREAS, the Board has determined that to the extent that there might be a lack of clarity between the map of October 25, 1982 and the Board of Estimate Resolution, the Resolution with its metes and bounds description clearly controls and is, in fact, the law with respect to the boundary of the PI district; and

WHEREAS, although the applicant has suggested that it was "likely" that Board of Estimate members understood themselves to be voting on the map rather than a written description as embodied in the resolution, the jurisdiction of the Board of Standards and Appeals does not extend to an inquiry into the decision-making process of the Board of Estimate; and

WHEREAS, the map accompanying the Board of Estimate Resolution contains a legend explaining that the area marked by dotted lines is the subject of the Board of Estimate action; thus it cannot be argued that the width of the district at East 96th Street was before the Board of Estimate and was acted upon by them on March 3, 1983; and

WHEREAS, after the official action of the Board of Estimate which clearly spelled out the boundary lines of the district, an error or lack of clarity in the printing of a map to accompany the Zoning Resolution cannot be held to represent a change in the substance of the law; and

WHEREAS, in this appeal application, the Board is not given authority to rule on any issue related to a developer's reliance on an erroneously issued permit.

Therefore, be it Resolved, the Board hereby determines that at all relevant dates on which approvals for permits for these premises were issued and revoked, the boundary line of the PI District was 150 ft. from Park Avenue along East 96th Street and that, therefore, the determination of the Commissioner of Buildings dated July 22, 1986 is sustained and the appeal is denied.

Adopted by the Board of Standards and Appeals, October 14, 1986.

Appendix 6

Determination of the Commissioner of the Department of Buildings of the City of New York, dated July 22, 1986

THE CITY OF NEW YORK

Department of Buildings
Executive Offices
120 Wall Street, New York, N.Y. 10005

Charles M. Smith, Jr., R.A., Commissioner
248-8811

July 22, 1986

Mr. Jay A. Segal
Rosenman Colin Freund Lewis & Cohen
575 Madison Avenue
New York, New York 10022

Re: 108 East 96th Street, Manhattan
Block 1524, Lot 65
NB # 59/85

Dear Mr. Segal:

Following a thorough review of your response to Borough Superintendent George C. Sakona, dated July 21, 1986, in which you attempt to document conformance with applicable laws, I hereby revoke the approval of plans and permits for NB 59/85 to the extent that such approvals authorized construction above the 19th story. All other approvals and authorizations for work at and below the 19th story will remain in full force and effect pending submission of revised plans.

You state in your letter that approval of plans with respect to zoning only was originally granted by the Department of Buildings on August 12, 1985, based upon zoning map 6b published by the City Planning Commission, which first reflected the amendment of May 24, 1984, and which you assert showed the

Park Improvement Special Purpose District as extending to a depth of 100 feet along Park Avenue.

Notwithstanding your further assertion that the published map reflecting a 150-foot depth for the PI district was not available until some time in November, 1985, I have concluded that you have failed to demonstrate that the applicants have complied with the applicable provisions of the zoning resolution as lawfully adopted.

Therefore, the stop work order issued by Mr. Sakona on July 11, 1986, for all work above the 19th story shall continue in effect. You are directed to notify Borough Superintendent George Sakona as to the steps and measures that will be taken to secure the upper floors and to protect adjacent property. In addition, the applicants have thirty days in which to submit revised plans which conform with the zoning resolution.

Sincerely,

s/ Charles M. Smith, Jr.
Charles M. Smith, Jr.
Commissioner

cc: Park Capital Realty Corp.
Box 130
Forest Hills Station
Forest Hills, NY

Mr. Albert Ginsberg
c/o Plaza Realty Investors Corp.
64-35 Yellowstone Blvd.
Forest Hills, NY 11375

Mr. Vincent Bagoli
HRH Construction
909 Third Avenue
New York, NY 10022

Schuman, Lichtenstein, Claman & Efron
227 East 45th Street
New York, NY 10017

Appendix 7

Notice of Appeal to the Supreme Court of the United States, dated May 5, 1988, and filed May 6, 1988

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 23977/86

In the Matter of the Application of

PARKVIEW ASSOCIATES,

Petitioner,

For Judgment pursuant to CPLR Article 78

—against—

CITY OF NEW YORK, COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK and BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK,

Respondents,

—and—

CIVITAS CITIZENS, INC.,

Intervenor-Respondent.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that petitioner, Parkview Associates, hereby appeals to the Supreme Court of the United States, pur-

suant to 28 U.S.C. § 1257(2), from the order of the Court of Appeals of the State of New York entered on February 9, 1988.

May 5, 1988

ROSENMAN & COLIN
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575 Madison Avenue
New York, New York 10022
(212) 940-8800

To: CLERK OF THE COURT OF APPEALS
OF THE STATE OF NEW YORK
Court of Appeals Hall
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Albany, New York 12207

CLERK OF NEW YORK COUNTY
County Courthouse
60 Centre Street
New York, New York 10007

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Appendix 8

Relevant Provisions of the Zoning Resolution of the City of New York (All emphasis is in original.)

§ 11-14 (Incorporation of Maps)

The location and boundaries of the districts established by this resolution are shown upon the zoning *maps*, which are hereby incorporated into the provisions of this resolution. The said *zoning maps* in their entirety, including all amendments thereto, shall be as much a part of this resolution as if fully set forth and described herein.

§ 11-22 (Applications of Overlapping Regulations)

Whenever any provision of this resolution and any other provisions of law, whether set forth in this resolution or in any other law, ordinance, or resolution of any kind, impose overlapping or contradictory regulations over the *use* of land, or over the *use* or *bulk* of *buildings or other structures*, or *contain* any restrictions covering any of the same subject matter, that provision which is more restrictive or imposes higher standards or requirements shall govern. In case of any conflict between the performance standards and the rules and regulations adopted by the Department of Environmental Protection, the more restrictive shall apply.

§ 12-01 (Rules Applying to Text of Resolution)

The following rules of construction apply to the text of this resolution:

(a) The particular shall control the general.

(b) In case of any difference of meaning or implication between the text of this resolution and any caption, illustration, summary table, or illustrative table, the text shall control.

(c) The word "shall" is always mandatory and not discretionary. The word "may" is permissive.

* * *

§ 12-10 (Definitions)

Words in the text or tables of this resolution which are *italicized* shall be interpreted in accordance with the provisions set forth in this Section.

* * *

"Zoning maps" are the maps incorporated into the provisions of this resolution in accordance with the provisions of Section 11-14 (Incorporation of Maps).

§ 76-11 (General Provision)

The district boundaries on the *zoning maps* shall be interpreted in accordance with the provisions set forth in Section 76-12 (Area Enclosed by District Boundary Line), Section 76-13 (Location of Boundary Line), and Section 76-14 (Additional Rules of Construction).

§ 76-12 (Area Enclosed by District Boundary Line)

An area enclosed by a district boundary line shall be in the district designated therein.

§ 76-13 (Location of Boundary Line)

The precise location of a boundary line is to be interpreted in accordance with the provisions set forth in this Section.

§ 76-131 (Boundary line parallel to the short dimension of block)

In cases where a boundary line extends parallel to the short dimension of the block [*i.e.*, in the present case, parallel to Park Avenue] and no dimensions are shown, such boundary line shall be considered to be located:

* * *

(c) In the case of all other districts, 100 feet from the nearest *street* within the district [*i.e.*, in the present case, 100 feet from Park Avenue].

§ 76-14 (Additional Rules of Construction)

§ 76-141 (When distance from street line shown)

In cases where the boundary line is shown by a dimension as being located a specific distance from a *street line*, this distance shall be considered to be measured from the nearest *street line* of the *street* from which dimensioned.

* * *

§ 92-06 (Special Height Limitation)

The maximum height of a *building* or *other structure* or portion thereof [in the Special Park Improvement District] shall not exceed 19 *stories* or 210 feet above *curb level*, whichever is less.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JEFFREY L. BRAUN, being sworn, states:

1. I am and was at all material times a citizen of the United States, a resident of the City, County and State of New York, and a person over the age of 18 years. I am not a party to this proceeding.

2. I am a member of the law firm of Rosenman & Colin. My business address is 575 Madison Avenue, New York, New York 10022-2585.

3. On May 9, 1988, I served the within Jurisdictional Statement in this proceeding by depositing true copies thereof, enclosed in sealed envelopes with postage thereon fully pre-paid, in the United States mail at New York, New York, addressed as follows:

Peter L. Zimroth, Esq.
Corporation Counsel
100 Church Street
New York, N.Y. 10007

Robert S. Davis, Esq.
Berle, Kass & Case
45 Rockefeller Plaza
New York, N.Y. 10111

s/ Jeffrey L. Braun
Jeffrey L. Braun

Sworn to before me this
9th day of May, 1988

s/ Anita Lofaso
Notary Public—State of New York
No. 03-4755325
Qualified in Bronx County
(original signed)

(2)

Supreme Court, U.S.
FILED
JUL 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1837

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

PARKVIEW ASSOCIATES,

Appellant,

-vs.-

CITY OF NEW YORK, COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK and CIVITAS CITIZENS, INC.,

Appellees.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

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LEONARD J. KOERNER,*
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PHYLLIS ARNOLD,
of Counsel.

July 11, 1988

*Attorney of Record

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THIS APPEAL IS NOT WITHIN THIS COURT'S JURISDICTION AND SHOULD BE DISMISSED.

IN ANY EVENT, THE APPEAL SHOULD BE DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION. THE STATE COURT'S CONSTRUCTION OF THE ZONING LAW FORECLOSES ANY CLAIM THAT PARKVIEW ACQUIRED AN INTEREST IN ITS BUILDING PERMIT SUBJECT TO DUE PROCESS PROTECTION. NO DUE PROCESS ISSUE IS OTHERWISE PRESENTED BY THE STATE COURT'S APPLICATION OF NEW YORK'S COMMON LAW OF ESTOPPEL TO THE FACTS OF THIS CASE 18

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

PARKVIEW ASSOCIATES,

Appellant,

-vs.-

CITY OF NEW YORK, COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK and CIVITAS CITIZENS, INC.,

Appellees.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

STATEMENT

Appellees, the City of the New York, the Commissioner of Buildings, the Department of Buildings, and the Board of Standards and Appeals of the City of New York ("municipal appellees"), move to dismiss the present appeal or, alternatively, to affirm the final order of the Court of

Appeals of the State of New York entered February 9, 1988, on the grounds that the appeal is not within this Court's jurisdiction and does not present a substantial federal question.

QUESTIONS PRESENTED

1. Has appellant, a developer who undertook construction of a 31-story building within a special zoning district in which building heights may not exceed 19 stories, pursuant to a building permit found by the state court to have been invalid when issued on the grounds that it failed to conform to applicable zoning law, raised a substantial federal question, when the state court has construed the zoning law to have imposed a district boundary dating back without change to its original enactment in 1973, thus at all times encompassing the property, and when state law does not protect one's right to build pursuant to an invalidly issued building permit?

2. May the New York State Court of Appeals apply well-settled principles of state common law to preclude the assertion of an estoppel against the City when an estoppel would frustrate the legislative will, when the undisputed facts suggest that this veteran developer's reliance on the codified version of the law, reflecting indicative shading of the actual zoning district boundary, without further inquiry, before constructing a multi-million dollar project on property unquestionably subject to that boundary at purchase, was unreasonable, and when the developer's assertions of actual, good faith reliance are disputed, unexplored on this record, and subject to development and consideration in its pending application for a variance?

FACTS

This appeal concerns the partial revocation of appellant Parkview Associates' ("Parkview's") building permit for premises located at 108 East 96th Street, New York, New York ("the building"). The administrative actions effectuating and sustaining the revocation were based upon findings that, at all relevant dates when Department of Buildings' approvals and permits were issued and revoked, the building failed to conform to applicable zoning law delineating the 96th Street boundary of the Special Park Improvement District ("PI District"), and thus limiting the allowable height of the building. Parkview's application for a variance from the strict enforcement of the height limitation is pending before the Board of Standards and Appeals ("BSA") and will be the subject of a hearing before that body on August 9, 1988.

The PI District was established in 1973 by resolution enacted by the Board of Estimate ("Board"). See Zoning Resolution §§92-00 et seq. The PI District regulations impose upon buildings within the District a maximum height of 19 stories or 210 feet, whichever is less. Zoning Resolution §92-06. As originally enacted, the PI District boundary on 96th Street extended 150 feet east of Park Avenue. Parkview has never disputed this fact.

The building is located on property situated on the south side of 96th Street, commencing 90 feet east of the southeast corner formed by the intersection of 96th Street and Park Avenue, and extending 100 feet east from there. Parkview purchased the property in 1982 at a time when it was unquestionably subject to the 150 foot PI District boundary on 96th Street.

The New York City Charter ("Charter") prescribes the only procedure for changing

the Zoning Resolution, including the zoning map. The zoning map is legisiatively established by the Board through language contained in adopted resolutions and is depicted graphically on the maps contained in the published Zoning Resolution. Sections 197-c and 200 of the Charter vest the Board with the authority, after public hearing, to designate zoning districts and to amend the zoning map following review and recommendation by affected community boards and the City Planning Commission ("CPC"). When acting on such matters, the Board functions in its legislative capacity and approves changes by the adoption of resolutions describing the action taken. The resolutions are available to the public at the offices of the Board and are provided to the Department of Buildings.

The relevant visual depiction of the Zoning Resolution's zoning map containing Parkview's property is map 6b. The only

legislative amendment to the PI District boundary in the vicinity of Parkview's property occurred on March 3, 1983 when the Board approved a resolution reflecting a metes and bounds description of changes reducing the boundary of the PI District from 150 feet to 100 feet east of Park Avenue for only the area between 88th Street and the lower half of the block between 95th and 96th Streets, leaving intact the 150 foot dimension east of Park Avenue for the upper half of the block between 95th and 96th Streets.

Subsequent to the Board's adoption of the resolution effecting these changes, an error in the printing of Zoning Resolution map 6b resulted in the omission of the number "150" and thus the failure to clearly indicate on the visual depiction of the map, other than by the shading, the continuation of the 150 foot dimension on 96th Street. Even so, the shading on the subsequently

printed Zoning Resolution map 6b displayed a longer PI District boundary on 96th Street than on streets to the south. In sum, an examination of the metes and bounds description of the zoning map change of March 3, 1983, as well as a copy of the diagram of the proposed changes presented to the members of the Board on that date clearly revealed the continuation of the 150 foot dimension on 96th Street, but the subsequently printed visual representation of the change, apart from the shading, did not otherwise indicate the 150 foot boundary on 96th Street.

Allegedly upon the invalid assumption that the PI boundary on 96th Street extended only 100 feet east of Park Avenue,[1] Parkview proposed the construction

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[1] Parkview's assertions of actual, reasonable, justifiable, and good faith
(Footnote Continued)

of a building with a height of 19 stories for the 10 feet of the property within 100 feet of Park Avenue and 31 stories for the remainder of the building. Pursuant to §§ 27-140, 27-142 and 27-157 of the New York City Administrative Code, Parkview's architect certified to the Department of Buildings the application's compliance with applicable law. In 1985, a Department of Buildings examiner approved that plan and

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(Footnote Continued)
reliance on the 6b zoning map are contested. The municipal parties have answered these allegations by denying adequate knowledge or information sufficient to form a belief as to their truth. Section 3018(a) of New York's Civil Practice Law and Rules gives these responses the effect of a denial. However, we requested an opportunity for discovery should the estoppel issue not be resolved against Parkview as a matter of law. Throughout this litigation we have urged that estoppel is unavailable as a matter of law and that, alternatively, if it does lie, based on the undisputed facts in the record, Parkview is not entitled to equitable relief. Having rejected Parkview's estoppel claim without a hearing, the state courts did not adjudicate the nature of Parkview's reliance.

the Department of Buildings issued a building permit.

Thereafter, in late 1985, the Department of City Planning circulated a revised map 6b to reflect subsequent but unrelated Board changes of September, 1985. The number "150" was reinserted on this version of the 6b map to clarify the picture.

On July 11, 1986, the Borough Superintendent of the Department of Buildings issued a stop work order for those portions of the building within 150 feet of Park Avenue and at the 20th story and above. The stop work order afforded Parkview 5 days within which to demonstrate compliance with applicable laws or suffer revocation of the permit. On July 21, 1986, Parkview's counsel tendered its arguments to the Commissioner of Buildings. Finding that Parkview had failed to demonstrate compliance, on July 22, 1986, the Commissioner of Buildings revoked the

approval of plans and permits for the building to the extent that such approvals authorized construction above the 19th story (Juris. St. App., pp. 23a-24a). The revocation was based on the developer's failure to demonstrate compliance with applicable zoning law continuing the 150 foot PI District boundary on 96th Street.

On July 23, 1986, Parkview appealed the Commissioner's partial revocation to the BSA. Parkview communicated directly with the Office of the Corporation Counsel concerning the provisions of Charter §669(c), which then provided, in part, that an appeal to the BSA "shall stay all proceedings in furtherance of the action appealed from...." The Corporation Counsel advised Parkview that Charter §669(c) did not have the effect of nullifying the revocation or of otherwise authorizing work without a permit. Despite having been clearly advised that any further construction

at the building would be performed at the developer's own risk of having to subsequently legalize the structure should the BSA sustain the revocation, Parkview continued to perform work on the structure above the 19th story.

On October 14, 1986, the BSA denied Parkview's appeal and sustained the Building Commissioner's partial revocation of the permit (Juris. St. App., pp. 20a-22a). It found that both the metes and bounds Board resolution of March 3, 1983 as well as the October 25, 1982 diagram of proposed changes presented to the Board reflected in words and by dotted lines, respectively, the absence of any change to the PI District boundary on 96th Street and that, in any event, the metes and bounds description controls. Accordingly, it found that the boundary was 150 feet on 96th Street at all dates on which permits were issued and revoked.

Parkview then commenced a proceeding in the New York State Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules challenging as arbitrary the administrative revocation of its building permit and asserting equitable and constitutional objections to the revocation. Parkview claimed that its right to build a 31-story building had vested, that the Department of Buildings should be estopped from strict enforcement of the law, and that the revocation deprived it of property without due process of law or just compensation in violation of the state and federal constitutions. Civitas Citizens, Inc., an interested community group, was permitted to intervene and opposed the petition. The municipal appellees also opposed the petition and counterclaimed for an order enjoining Parkview's maintenance of the building in excess of the lesser of 19

stories or 210 feet and directing the removal of the illegal portion of the building.

OPINIONS BELOW

The State Supreme Court rejected Parkview's claims and dismissed its petition without prejudice to its application for a variance (Juris. St. App., pp. 11a-19a). It sustained the agency determinations that the 96th Street PI District boundary has always been 150 feet, holding that the metes and bounds description of the change in the March 3 resolution controls, rendering Parkview's permit invalid when issued. It rejected the vested rights claim, citing well-settled New York law that no rights arise in consequence of the issuance of invalid permits. It also rejected the estoppel claim, finding the matter controlled by New York's general rule that estoppel is unavailable against the government. Finally, the constitutional claims were found premature and otherwise meritless in light of

the availability of the variance procedure. The Supreme Court also ruled the City's counterclaim premature absent a decision on Parkview's variance application.

By unanimous order, the Appellate Division, First Department, affirmed the order below for the reasons stated by the Justice below (Juris. St. App., pp. 9a-10a). 129 A.D.2d 405, 513 N.Y.S.2d 342 (1st Dept., 1987).

By order entered July 9, 1987, Parkview's appeal to the New York State Court of Appeals pursuant to CPLR §5601(b)(1) was dismissed sua sponte "upon the ground that no substantial constitutional question is directly involved." 70 N.Y.2d 692 (1987). Thereafter, Parkview sought and obtained leave to appeal to the Court of Appeals. 70 N.Y.2d 610 (1987). On February 9, 1988, the Court of Appeals affirmed (71 N.Y.2d 274, 519 N.E.2d 1372

(1988)) and on April 28, 1988, it denied reargument. ___ N.Y.2d ___ (1988).

The Court of Appeals held that Parkview's permit was invalid when issued, finding that the 96th Street PI District boundary, "pursuant to the metes and bounds, remained at all times 150 feet . . . [leaving Parkview's property] unaffected by . . . [the] 1983 change and . . . always . . . governed by the 1973 original enactment." 71 N.Y.2d at 279, 519 N.E.2d at 1373. The Court thus held proper the agency determinations revoking and sustaining the revocation of Parkview's permit. It refused to permit the assertion of an estoppel against the City's enforcement of the law and, in light of the pending variance application, did not otherwise address Parkview's claim to have suffered a taking of

its property without due process or just compensation.[2]

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[2] On this appeal, Parkview has conceded the prematurity of its takings claim. See Juris. St., p. 28 n.8.

ARGUMENT

THIS APPEAL IS NOT WITHIN THIS COURT'S JURISDICTION AND SHOULD BE DISMISSED.

IN ANY EVENT, THE APPEAL SHOULD BE DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION. THE STATE COURT'S CONSTRUCTION OF THE ZONING LAW FORECLOSES ANY CLAIM THAT PARKVIEW ACQUIRED AN INTEREST IN ITS BUILDING PERMIT SUBJECT TO DUE PROCESS PROTECTION. NO DUE PROCESS ISSUE IS OTHERWISE PRESENTED BY THE STATE COURT'S APPLICATION OF NEW YORK'S COMMON LAW OF ESTOPPEL TO THE FACTS OF THIS CASE.

(1)

Parkview's attempt to invoke jurisdiction pursuant to 28 U.S.C. §1257(2) is defective as no statute's validity has here been drawn into question. Prior to its recent amendment (Pub. L. No. 100-352), 28 U.S.C. §1257(2) gave this Court jurisdiction to review a final judgment or decree of New York's State Court of Appeals where there "... is drawn in question the validity of a statute ... on

the ground of its being repugnant to the Constitution, ... and the decision is in favor of its validity." Federal constitutional objections to the exercise of authority pursuant to a statute whose validity is not otherwise challenged cannot form the predicate for an appeal. Hanson v. Denckla, 357 U.S. 235, 244, reh. denied, 358 U.S. 858 (1958); Wilson v. Cook, 327 U.S. 474, 482 (1946). See Silkwood v. Kerr - McGee Corp., 464 U.S. 238, 247, reh. denied, 465 U.S. 1074 (1984). Parkview's claim to have been deprived of property without due process of law is based on its objections to the revocation of its building permit. It thus asserts a challenge to the effect of the exercise of authority under local law without otherwise drawing into question the constitutional validity of any statute. Thus, this Court lacks jurisdiction of the appeal.

(2)

In any event, this appeal presents no substantial federal constitutional question. Parkview's effort to demonstrate otherwise through its oblique presentation of the issues represents nothing more than an attempt to bring before this Court its dissatisfaction with the Court of Appeals' resolution of its state law claims. By sustaining the finding that the PI District boundary on 96th Street is and has always been 150 feet, the Court of Appeals has properly construed applicable local law to have conferred no legally protected interest in the building permit and has, in so doing, properly rejected the contention that the insertion of the number "150" on zoning map 6b in 1985 constituted a substantive change in the law. Thus, the Court of Appeals' construction of local law forecloses Parkview's assertion of due process claims.

Nor does the Court of Appeals' treatment of the case as one involving simple mistake rather than a discretionary interpretation which, although reasonable, is nonetheless erroneous, and its attendant suggestion on the facts of this case that a good faith inquirer's reasonable diligence would have disclosed the boundary's true location, raise a substantial due process issue warranting this Court's review. This is especially so when the pendency of the variance application makes the extent of Parkview's harm, if any, incapable of determination at this time.

Parkview here attempts to re-litigate in assertedly constitutional form the questions of state and local law disposed of by New York's highest state court. But as this Court long ago commented:

> ... the Fourteenth Amendment cannot be availed of "as a means of bringing to the test of the decision of this court the abstract

> opinions of every unsuccessful litigant in the state court of the justice of the decision against him . . . ."

New York and New England Railroad Company v. Bristol, 151 U.S. 556, 570 (1894), quoting Davidson v. New Orleans, 96 U.S. 97, 104 (1877). Parkview's constitutional characterization of its appeal should be rejected with a finding that it presents no substantial federal question.

A. Parkview is foreclosed from raising procedural due process claims.[4]

The state law determination that the PI District boundary on 96th Street has never

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[4] We characterize as procedural due process claims those of Parkview's contentions that are predicated on the assertion that the PI District boundary was redrawn before the permit was issued and was revised or reinterpreted sometime thereafter. This issue is not premature and was not so treated by the Court of Appeals. Rather, it was disposed of through the Court's construction of the zoning law.

been changed from 150 feet is beyond this Court's review. See, e.g., 324 Liquor Corp. v. Duffy, 479 U.S. 335, ___ n.6, 107 S.Ct. 720, 725 n.6 (1987). It compels two conclusions as a matter of state law: 1) that Parkview's building permit was void as having been issued without statutory authority, conferring no property interest subject to due process protection; and 2) that the 1985 insertion of the number "150" on the codified zoning map 6b was without legal significance.

Parkview concedes that the Court of Appeals resolved a question of state law by sustaining the agency determinations that the PI District boundary is 150 feet from Park Avenue at 96th Street (Juris. St., p. 16). Its assertions of constitutional infirmity, however, are premised on its inappropriate effort to impeach this holding. Parkview's claim to have been deprived of property without due process of law assumes that it

possessed a property interest subject to due process protection. Parkview essentially argues that the Board redrew or should be found to have redrawn the 96th Street PI District boundary on March 3, 1983, making its building permit lawful when issued, and giving rise to a protectible right to construct a 31-story building on so much of the property as extends beyond 100 feet of Park Avenue. See Juris. St., pp. 6-8, 24. So, Parkview continues, the insertion of the number "150" on the codified zoning map 6b in 1985 is claimed to have been a "secret revision" (Juris. St., pp. 10, 20) of the zoning map that deprived it of property without sufficient notice or adequate opportunity to mitigate the consequences of the purported deprivation. Parkview makes no claim directed to the propriety of the procedures employed in effecting the revocation; nor does it claim any constitutional infirmity deriving from or any

violation of the Charter's statutory requirements governing amendment of the zoning law. See Charter §§ 197-c and 200. Rather, its contention is that the City applied to Parkview's pre-existing property interest a substantively revised or reinterpreted zoning map.

Parkview's formulation of the issue suffers from the fallacy of assuming a predicate that was found against it as a matter of state law, viz., that the PI District boundary on 96th Street was redrawn before its permit was issued. Due process guarantees apply only to those property interests created or defined by "... an independent source such as state law." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). While it is true that, once a property interest is found in state law, the federal constitution measures the adequacy of procedures employed for its deprivation (see Cleveland Board of

Education v. Loudermill, 470 U.S. 532, 541 (1985)), the threshold question of whether a property interest exists must be answered by reference to a source independent of the constitution, such as state law. The Court of Appeals in the instant case has answered that question by construing local zoning law and by holding that, as so construed, Parkview acquired no legally protected right under state law. 71 N.Y.2d at 279-282, 519 N.E.2d at 1373-1375. This state court determination forecloses Parkview's claim of constitutional infirmity.

The construction given the zoning law by the Court of Appeals is binding on this Court. 324 Liquor Corp. v. Duffy, 479 U.S. 335, ___ n.6, 107 S. Ct. 720, 725 n.6 (1987); O'Brien v. Skinner, 414 U.S. 524, 531 (1974); Kingsley International Pictures Corp. v. Regents of the University of the State of New York, 360 U.S. 684, 688 (1959). See also Guaranty Trust Co. v.

Blodgett, 287 U.S. 509, 513 (1933); Telluride Power Transmission Co. v. Rio Grande Western Railway Co., 187 U.S. 569, 584 (1903). The Court of Appeals construed the zoning law to have imposed a 150 foot PI District boundary on 96th Street from the date of its 1973 enactment through the present, without any change having been effected by intervening legislative amendments to the zoning map or by insertion of the number "150" on the codified version of the zoning map. This construction of the governing zoning law is beyond this Court's review.

Equally unimpeachable in this Court are the legal conclusions that arise under New York law from the fact that the PI District boundary on 96th Street is and has always been 150 feet. The Administrative Code leaves the Commissioner of Buildings without discretion to approve a permit application that fails to conform to applicable provisions

of law, and authorizes the revocation of a permit issued in error when conditions are such that a permit ought not have been issued. Administrative Code §§27-191 and 27-197. See Citizens for the Preservation of Windsor Terrace v. Smith, 122 A.D.2d 827, 505 N.Y.S.2d 896 (2d Dept., 1986). Accordingly, the Court of Appeals properly concluded that Parkview's permit was invalid when issued, as purporting to authorize construction in excess of the statutory height limitation within the 150 foot PI District boundary, and was thus properly revoked. Under long-standing principles of state law, no claim of vested rights can arise in consequence of the issuance of invalid building permits. Natchev v. Klein, 41 N.Y.2d 833, 834, 361 N.E.2d 1043, 1044 (1977); Jayne Estates, Inc. v. Raynor, 22 N.Y.2d 417, 422, 239 N.E.2d 713, 715 (1968); Perrotta v. City of New York, 107 A.D.2d 320, 325, 486 N.Y.S.2d 941, 945 (1st

Dept.), aff'd, 66 N.Y.2d 859, 489 N.E.2d 255 (1985). See also B & G Construction Corp. v. Board of Appeals, 309 N.Y. 730, 732, 128 N.E.2d 423, 424 (1955); City of Buffalo v. Roadway Transit Co., 303 N.Y. 453, 463, 104 N.E.2d 96, 100 (1952); Albert v. Board of Standards and Appeals, 89 A.D.2d 960, 962, 454 N.Y.S.2d 108, 110-111 (2d Dept., 1982), app. dism., 59 N.Y.2d 673 (1983). Under New York law, Parkview acquired no legally cognizable right to construct a 31-story building within 150 feet of Park Avenue.[5]

Even if this Court were to examine the Court of Appeals' construction of the zoning

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[5] It is for this reason that Parkview's reliance on Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and its progeny is misplaced. See Juris. St., pp. 20-22. A threshold state law property interest was a necessary predicate to the application of due process guarantees in those cases and Parkview can make no claim to such an interest here.

law, we submit that it should conclude, as did the state court, that the PI District boundary on 96th Street is and has always been 150 feet, making Parkview's permit invalid when issued. This conclusion is evident from an examination of the proceedings effecting the zoning map change of March 3, 1983, for Parkview does not dispute the fact that the boundary was 150 feet prior to that time and does not suggest that the boundary's alteration was effected by some other legislative act.[6]

On March 3, 1983, the Board of Estimate enacted a resolution approving

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[6] Parkview cites May 24, 1984 Board of Estimate legislative changes to map 6b in support of its assertion that the boundary change it claims was effected in 1983 was carried forward through subsequent proceedings (Juris. St., pp. 8, 18). Parkview has never claimed that the 96th Street PI District boundary was affected by any legislation other than the March 3, 1983 Board of Estimate resolution.

certain zoning map changes that unequivocally retained the 150 foot PI District boundary on 96th Street. Both the text describing the changes and their graphic representation on the CPC certified diagram of October 25, 1982, submitted to the Board in support of CPC's recommendation to approve the changes, clearly reflect no change to the 96th Street PI District boundary. The October 25, 1982 CPC diagram showed that only the area enclosed by a dotted line was proposed to be altered, and the dotted line extended north only to the midblock between east 95th Street and east 96th Street. More importantly, the metes and bounds description of the changes contained in the resolution reflected in words the absence of any reduction to 100 feet on 96th Street.

Indeed, Parkview concedes that the Board's metes and bounds description reveals no reduction in the 150 foot boundary. See

Juris. St., p. 7. Its factual assertion that the October 25, 1982 diagram shows a reduction on 96th street was rejected by every court below, as the diagram does not include 96th Street in the change and is thus consistent with the metes and bonds description.[7]

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[7] Even assuming, arguendo, that the October 25 diagram did not clearly accord with the Board's metes and bounds description of the zoning map change, the description would nonetheless control so as to result in an unambiguous continuation of the 150 foot dimension on 96th Street. Specific statutory provisions prevail over general ones. See Sutherland Stat. Const. §46.05 (4th Ed.); People v. Mobil Oil Corp., 48 N.Y.2d 192, 199-200, 397 N.E.2d 724, 728 (1979); Zoning Resolution §12-01. Thus, within the resolution itself, the particular metes and bounds description controls the general reference to the October 25 diagram.

Moreover, because the Board's resolution constitutes the legislation effecting the map change and contains a clear and unambiguous metes and bounds description of the change, it leaves no doubt that the map change continued the 150 foot PI District dimension on 96th Street. See Mallett v. Village of Mamaroneck, 283 App. Div. 1094, 1094-1095, 131 N.Y.S.2d 504, 505 (2d Dept., 1954), (Footnote Continued)

The issue in this case stems from an error in printing the Zoning Resolution version of the 6b zoning map subsequent to the Board's approval of certain changes on March 3, 1983. That error lends no support to Parkview's assertion that the zoning map in effect when its permit was issued reflected a reduction of the PI District boundary to 100 feet. The problem is not unlike that which results when a provision of positive law, actually and specifically enacted by proper authority, is at variance with the codified version of the law. For example, such cases of inconsistency between the Statutes at Large, enacted as positive law, and the codified United States Code are

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(Footnote Continued)
aff'd, 308 N.Y. 821, 125 N.E.2d 873 (1955). Compare Soron Realty Co., Inc. v. Town of Geddes, 23 A.D.2d 165, 168, 259 N.Y.S.2d 559, 561-562 (4th Dept., 1965); Matter of H.P.V.T. Corp. v. McGuire, 58 Misc. 2d 159, 162-163, 294 N.Y.S.2d 787, 791 (Sup. Ct., Suffolk Co., 1968).

resolved with the rule that the positive law prevails over the codification. American Bank & Trust Co. v. Dallas County, 463 U.S. 855, 864 n.8, reh. denied, 463 U.S. 1250 (1983); United States v. Welden, 377 U.S. 95, 98 n.4 (1964); Stephan v. United States, 319 U.S. 423, 426 (1943). In the instant case, the textual metes and bounds description of the zoning map change, having been actually and specifically enacted by the Board by its resolution of March 3, 1983, prevails over any inconsistency in the graphic representation of the change reflected in the subsequent printing of the Zoning Resolution's maps.[8]

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[8] No significance attaches to the fact that the Department of City Planning sponsors the publication of the Zoning Resolution (see Juris. St., pp. 5-7). The Department of City Planning necessarily functions in different capacities as the source of proposed zoning map changes and as publisher of those changes enacted by the (Footnote Continued)

This conclusion properly recognizes the fact that map 6b is not a statute and that the Board does not legislate zoning changes by enacting pictures. The statutory enactment in the present matter is the Board's March 3 resolution. Indeed, New York City's statutory zoning is reflected exclusively in the Board's resolutions. Zoning is a state and local function, and the fixing of zoning district boundaries is a legislative act that must be effected by a legislative body. See, e.g., Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir.), cert. denied, 459 U.S. 989 (1982); Shapiro v. Town of Oyster Bay, 27 Misc. 2d 844, 846-847, 211 N.Y.S.2d 414, 417 (Sup. Ct., Nassau Co., 1961), aff'd, 20

(Footnote Continued)
Board. No administrative printing error can change the controlling legislative action of the Board as reflected in the language of its resolutions.

A.D.2d 850, 249 N.Y.S.2d 663 (2d Dept., 1964). The graphic representations of zoning district boundaries contained in the published Zoning Resolution's zoning maps are codifications without independent legal effect. The Board's March 3 enacted resolution unequivocally maintained the 150 foot dimension on 96th Street notwithstanding the printing error on the codified version of map 6b.

Parkview's reliance on the interpretive provisions of Zoning Resolution §76-131(c)[9] and on the incorporation provisions of Zoning Resolution §11-14[10] begs the question

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9 See Juris. St., pp. 7, 10. Zoning Resolution §76-131(c) provides that in situations there specified where "no dimensions are shown" the boundary shall be 100 feet.

10 See Juris. St., p. 5. Zoning Resolution §11-14 incorporates into the Resolution the zoning maps depicting the location and boundaries of zoning districts.

in this case. The interpretive provisions of §76-131(c) apply only where no dimensions are shown, but the Board's March 3 resolution clearly indicates dimensions. Indeed, these interpretive provisions have no independent legal significance with respect to the fixing of zoning district boundaries. Moreover, the incorporation provisions of §11-14 simply cannot be held to incorporate a visual depiction of the zoning map at odds with the statutory zoning map enacted through the Board's adoption of its resolution. See Zoning Resolution §§11-22 and 12-01(a) and (b) (Juris. St. App., p. 27a) (providing, respectively, that, as to provisions covering the same subject matter, the more restrictive shall govern, that the particular controls the general, and that the text controls over any illustration). The Board's resolution constitutes the legislation fixing the PI District boundary on 96th Street and retaining it unequivocally at 150

feet. It is that controlling resolution that is incorporated into the published Zoning Resolution.

The Court of Appeals thus properly construed New York City's zoning law to have imposed a 150 foot PI District boundary on 96th Street dating back without change to the establishment of the PI District in 1973. In light of this construction, there can be no claim that the 1985 insertion of the number "150" on a version of Zoning Resolution map 6b circulated after Parkview's permit was issued constituted a substantive change in, or revision of, the boundary. The insertion of the number effected no legal alteration at all, as the zoning map change, as statutorily enacted by the Board on March 3, maintained this 150 foot boundary. The insertion of the number constituted a ministerial act of clarifying the codification by placing the number "150" where it was otherwise prescribed by law and where the

shading otherwise indicated it to be. Under the circumstances of this case, Parkview has received all the process it was due. See Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915); Rogin v. Bensalem Township, 616 F.2d 680, 692-694 (3d Cir., 1980), cert. denied sub nom. Mark-Garner Associates, Inc. v. Bensalem Township, 450 U.S. 1029 (1981).

In sum, Parkview acquired no interest in its building permit subject to due process protection, nor were its rights in any way impaired by the simple act of placing the number "150" where the law already fixed a 150 foot boundary. This appeal presents no substantial federal question warranting this Court's review.

B. No due process issue is presented by the Court of Appeals' application of New York's common law of estoppel to the facts of this case.

(1)

Parkview's assertion of constitutional infirmity deriving from the Court of Appeals' disposition of the estoppel issue (see Juris. St., pp. 22-27) does not present a substantial federal question. Parkview here inappropriately re-argues its estoppel claim. Application of state common law principles of estoppel is simply not within this Court's authority to entertain. Michigan v. Flint and Pere Marquette Railroad Co., 152 U.S. 363, 368 (1894). Moreover, on the facts of this case there is nothing so shocking about the application of state law so as to warrant invalidation on federal constitutional grounds. Thus, the appeal should be

dismissed for want of a substantial federal question.[11]

The Court of Appeals in the instant case applied well-settled principles of New York State's common law of estoppel. On the basis of ample precedent, it held that this case is governed by the general rule in New York that estoppel is unavailable to prevent a governmental agency from enforcing a statute or to ratify administrative error in the issuance of a

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[11] The Court of Appeals did not expressly pass upon a purported due process claim independent of the estoppel issue and of Parkview's claim to have suffered a taking of its property without due process or just compensation. In such an instance, absent a demonstration to the contrary, it is assumed that the failure to address the question was due to a failure to have properly presented it in the state court. Exxon Corp. v. Eagerton, 462 U.S. 176, 181 n.3 (1983); Street v. New York, 394 U.S. 576, 582 (1969). Parkview has not demonstrated that it properly presented in the state courts its claim that application of New York's estoppel law deprives it of property without due process of law.

building permit. 71 N.Y.2d at 282, 519 N.E.2d at 1374-1375. See Perrotta v. City of New York, 66 N.Y.2d 859, 489 N.E.2d 255 (1985); City of New York v. City Civil Service Commission, 60 N.Y.2d 436, 448-449, 458 N.E.2d 354, 361 (1983); Matter of Hamptons Hospital and Medical Center v. Moore, 52 N.Y.2d 88, 93, 417 N.E.2d 533, 536 (1981). See also City of Yonkers v. Rentways, Inc., 304 N.Y. 499, 505, 109 N.E.2d 597, 599 (1952); New York City Employees' Retirement System v. Eliot, 267 N.Y. 193, 203, 196 N.E. 23 (1935). The Court acknowledged "... those policy reasons which foreclose estoppel against a governmental entity in all but the rarest cases...." 71 N.Y.2d at 282, 519 N.E.2d at 1375. These policy considerations consist in the important public interest in preserving the separation of powers and in insuring that the law as enacted - including those portions of the City's comprehensive zoning

scheme that prescribe the PI District height limitation as well as provisions for its variation - be enforced as written. On the facts of this case, the Court of Appeals found no occasion to depart from the general no estoppel rule.[12]

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[12] This is not to say that the New York state courts adhere blindly to this result. Rather, they perform a careful case-by-case analysis and have not hesitated to prevent strict enforcement of the law when private parties have secured vested rights under a permit valid when issued but assertedly affected by a subsequent change in the law or when the government has been found to have acted in bad faith. See Faymor Development Co. v. Board of Standards and Appeals, 45 N.Y.2d 560, 565-566, 383 N.E.2d 100, 102-103 (1978); Matter of Pokoik v. Silsdorf, 40 N.Y.2d 769, 772, 358 N.E.2d 874, 876-877 (1976); Matter of Temkin v. Karagheuzoff, 34 N.Y.2d 324, 328-329, 313 N.E.2d 770, 772 (1974); Landmark Colony at Oyster Bay v. Board of Supervisors, 113 A.D.2d 741, 743-744, 493 N.Y.S.2d 340, 343 (2d Dept., 1985); Lefrak Forest Hills Corp. v. Galvin, 40 A.D.2d 211, 218-219, 338 N.Y.S.2d 932, 939 (2d Dept., 1972), aff'd, 32 N.Y.2d 796, 298 N.E.2d 685, cert. denied, 414 U.S. 1004 (1973). Parkview has made neither showing in the instant case. Indeed, it is for this reason that Parkview's

(Footnote Continued)

Parkview essentially asks this Court to require New York State to adopt a common law estoppel rule covering instances where an agency has reached a plausible, but erroneous interpretation of the law. See Juris. St., pp. 24-26. But New York's Court of Appeals has declined to embrace this rule and no constitutional impropriety can thus arise. More importantly, this case is not an instance that may properly be regarded as one of a governmental agency's reasonable, though erroneous interpretation of law.[13] No infirmity results from the

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(Footnote Continued)
citations to Dobbins v. City of Los Angeles, 195 U.S. 223 (1904), Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir., 1981), cert. denied, 456 U.S. 973 (1982), and People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952) are unavailing (Juris. St., pp. 23-24). These cases are based on a vested rights analysis, and Parkview has not acquired vested rights.

[13] A true interpretation case is one where a statute as enacted by the legislature contains
(Footnote Continued)

Court of Appeals' refusal to treat the case in

(Footnote Continued)
general terms capable of application on a case-by-case basis, and gives to an administrative agency the authority to reach any of a number of permissible results through the exercise of its administrative discretion, so long as that discretion is not exercised arbitrarily. In such cases, differential application of the statutes contravenes no indication of legislative will because the legislative will has not been immutably fixed. Cox v. Louisiana, 379 U.S. 559, reh. denied, 380 U.S. 926 (1965) (see Juris. St., p. 26) is such a case, where the statute prohibited demonstrations "near" a courthouse, but did not define the term "near," leaving to police officials the task of determining on a case-by-case basis what "near" means. United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655 (1973) ("PICCO") (see Juris. St., p. 26) is also such a case, where a statute had been once interpreted by the Army Corps of Engineers to allow unpermitted dumping of deposits that did not impede navigation. (Indeed, both Cox and PICCO are criminal cases, making them inapplicable on this ground in addition to the fact that they are interpretation cases and the present one is not.)

The present matter simply does not fit the reasonable interpretation model. It is not an instance where the statute sets forth a general term capable of differential application on varying facts. The zoning law prescribes in unambiguous terms and in

(Footnote Continued)

the manner Parkview suggests.

Nor is Parkview's argument aided by citation to cases such as Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) and Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) involving the retroactive application of new legislative, regulatory, or judicial rules. See Juris. St., pp. 23-24. As demonstrated, this is not a case in which the governing rule was changed at all; it was simply misapplied in error. Moreover,

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(Footnote Continued)
all circumstances a 150 foot PI District boundary on 96th Street and a clear height limitation within the PI District of the lesser of 19 stories or 210 feet. There was no interpretation of the law here at all. Rather, there was clerical error in printing the codification and a single official's error in administering the law through the issuance of an invalid building permit. Thus, even if some constitutional infirmity could be imputed to the Court of Appeals' refusal to treat this case as an example of a reasonable, albeit erroneous interpretation of law, Parkview cannot plausibly suggest that this case is an appropriate vehicle for adopting that rule.

because the PI District boundary has never been changed, Parkview, unlike one truly aggrieved by the retroactive application of a new rule of law, possessed no legally protected interest capable of defeasance.[14]

(2)

Parkview suffers no violation of its due process rights through the Court of Appeals'

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[14] Far from being a "fiction," (Juris. St., p. 24) the fact that Parkview acquired no property interest in constructing a 31-story building within 150 feet of Park Avenue is a conclusion dictated by state law. The Administrative Code expressly conditions the issuance of a building permit on compliance with applicable law, and authorizes its revocation if it was issued in error and conditions are such that it ought not have been issued. Administrative Code §§ 27-191 and 27-197. As shown, supra, pp. 27 - 29, the permit was invalid when issued and cannot under New York law confer any vested right to build. This is in stark contrast to the recharacterization of state-recognized rights found bogus in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 539 n.5 (1985) and Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980). See also Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 11-12 (1978).

application to the facts of this case of the general rule foreclosing estoppel against the City. To the extent that Parkview takes issue with the Court of Appeals' purported refusal to adjudicate this claim (Juris. St., pp. 27-29), its contention should be rejected.[15] The so-called enormity of Parkview's "forfeiture" (Juris. St., p. 26) is incapable of determination before the variance proceeding is completed. In this respect, Parkview's due process claim suffers from an infirmity similar to that concededly applicable to its takings claim - it is not ripe. See Pennell v. City of San Jose, ___ U.S. ___, 108 S. Ct. 849, 857 n.5 (1988); Hodel v. Indiana, 452 U.S. 314,

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[15] We suggest that the due process implications of application of the estoppel rule were not properly presented to the Court of Appeals. See supra at 41 n.11. To the extent that they were, the due process claim is as premature as the takings claim and is otherwise meritless.

335-336 (1981); Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264, 304 (1981). Cf. Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 191-192 n.12, 199-200 (1985). Compare Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926). Parkview raises no facial constitutional challenge in this case, and this record does not present any tangible evidence of the consequences to Parkview of the permit revocation at issue. No one is in a position to know Parkview's ultimate harm until it is determined whether the offending 12 stories will be legalized by a variance. Parkview's due process claim is prematurely asserted.

Moreover, on this record, Parkview's assertions of actual, reasonable, and good faith reliance on map 6b are contested. These are facts peculiarly within Parkview's knowledge but which, because of the

applicability of the general estoppel rule and the dispositions below, were not developed.[16] It is in the upcoming variance process that a full factual record will be made in accordance with sections 666 and 668 of the New York City Charter and §72-21 of the Zoning Resolution. Among the open issues the BSA will consider is whether "... the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner." Zoning Resolution §72-21(d). In the event that Parkview's application for a variance is denied, it can challenge that determination in the state courts. See, e.g., Matter of Cowan v. Kern, 41 N.Y.2d 591, 363 N.E.2d 305 (1977). This record simply affords no basis for adjudicating Parkview's claim to have

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16 See supra at 8 n.1.

been deprived of property without due process of law.

In any event, there is nothing so shocking or offensive to civilized notions of decency in the Court of Appeals' application of the estoppel rule to the facts of this case so as to warrant invalidation of the revocation on constitutional grounds. Given that Parkview's permit was issued without statutory authority, there was nothing arbitrary about its revocation. Parkview's reliance on Moore v. City of East Cleveland, 431 U.S. 494 (1977) and Rochin v. California, 342 U.S. 165 (1952) for the proposition that the City's action "contravenes a basic sense of justice" (see Juris. St., p. 26)[17] is misplaced. Moore

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[17] We suggest that the issues of discrimination treated in Examining Board of Engineers v. Flores de Otero, 426 U.S. 572, (1976), Schneider v. Rusk, 377 U.S. 163 (Footnote Continued)

and Rochin gave content to the substantive due process guarantee of liberty in circumstances in which it was threatened by regulation "... slicing deeply into the family itself," possessing only a "tenuous relation" to the government's otherwise legitimate objectives (Moore, 431 U.S. at 498, 500) and by police techniques "... too close to the rack and the screw to permit of constitutional differentiation" (Rochin, 342 U.S. at 172). Parkview has no such cognizable interest at stake and cannot be found to have been subjected to governmental action so arbitrary or unreasonable on these facts as to shock the conscience.

Although this record leaves unexplored the issues of Parkview's actual, reasonable,

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(Footnote Continued)
(1964), and Bolling v. Sharpe, 347 U.S. 497 (1954) (Juris. St., p. 26) have no relevance to the instant case.

and justifiable reliance on zoning map 6b, it nonetheless contains certain undisputed facts suggesting that Parkview's reliance on the codification, without further inquiry, was unreasonable. Zoning map 6b reflected shading indicating a longer PI District boundary on 96th Street than on streets to the south. Both Parkview's principal and the architect it employed are experienced, and there has never been any question but that Parkview's property was subject to the 150 foot boundary at the time of its purchase in 1982. Indeed, when purchasing a piece of property, one might not uncommonly inquire as to its development potential. In these circumstances, Parkview's reliance on the 6b zoning map, without further inquiry as to the boundary's actual location, may not have been reasonable. The Court of Appeals' ruling sustaining the permit revocation and refusing to estop the City from strict enforcement of the law thus does

not sanction governmental action that on these facts even remotely approaches that which is so offensive to a basic sense of justice as to warrant invalidation on substantive due process grounds.[18]

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[18] Parkview misses the point by claiming that due process prevents it from being charged with knowledge of the boundary's actual location. See Juris. St., pp. 17-20. First, the cases it relies on for this proposition concern the application to cognizable legal interests of statutes expressly directing their extinguishment under certain conditions. See Hodel v. Irving, ____ U.S. _____, 107 S. Ct. 2076 (1987); United States v. Locke, 471 U.S. 84 (1985); Texaco, Inc. v. Short, 454 U.S. 516 (1982). They have no application to the present matter where a long-standing statutory prescription is applied to revoke a permit that should not have been issued in the first instance. Moreover, the Court of Appeals' suggestion that a good faith inquirer's reasonable diligence would have disclosed the boundary's true location cannot be read as anything more than a statement that, based on the uncontested facts in this record, it is not unreasonable to have required Parkview to inquire further and so to charge it with constructive notice of what the law has provided since 1973. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-385 (1947). That the

(Footnote Continued)

Estoppel is ultimately an equitable doctrine. See Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 59 (1984). Yet the facts as presented on this record do not support its application. On the one hand, Parkview continued construction above the 19th story during the pendency of its appeal to the BSA after having been advised by the City's top legal advisor of the consequences of an unsuccessful appeal. Indeed, Parkview did not file its variance application with the BSA until May, 1987, nearly ten months after its permit was revoked.

On the other hand, there has never been a suggestion in this case that the

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(Footnote Continued)
published Zoning Resolution has been designed as a convenience to members of the development community does not relieve them of the responsibility of ascertaining what the law in no uncertain terms specifies especially where, as here, the facts suggest further inquiry to have been in order.

Department of Buildings has proceeded in anything but good faith and at the first known opportunity to correct the consequences of municipal error in order to insure the integrity of the City's zoning law. The critical municipal planning and development objectives that underlie the City's overall zoning scheme would be severely undercut by a judicially sanctioned overbuilding of Parkview's property. The zoning law reflects a uniform system of regulation and control and includes provision for varying the strict application of the law upon satisfaction of the required showings. See Zoning Resolution §72-21. It is essential that developers adhere to the overall scheme of regulation and control set forth by the zoning law lest the public interest in orderly and consistent development be utterly undermined. Moreover, the grant of relief in this case would remove any incentive for developers and their architects to take a

responsible part in the permit approval process by sending a clear signal that those who do a slipshod job of certifying compliance with the zoning laws, and who manage to get away with it in the approval process, may benefit from the mutual mistake.

Parkview in effect attempts to constitutionalize its estoppel claim. But a substantial federal question cannot be created by giving a constitutional gloss to routine zoning disputes that can be and have in this case been adequately addressed by state courts. Hynes v. Pasco County, Florida, 801 F.2d 1269, 1270 (11th Cir., 1986); Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 831-834 (1st Cir.), cert. denied, 459 U.S. 989 (1982); Studen v. Beebe, 588 F.2d 560, 566 (6th Cir., 1978). See also Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023, 1035-1036 (3d Cir.), cert. denied, ___ U.S.

___, 107 S. Ct. 2482 (1987); Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 58-59 (2d Cir., 1985); South Gwinnett Venture v. Pruitt, 491 F.2d 5, 7 (5th Cir.) (en banc), cert. denied, 419 U.S. 837 (1974). Thus, this case presents no substantial federal question.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION. ALTERNATIVELY, THE ORDER APPEALED FROM SHOULD BE AFFIRMED. IF THE JURISDICTIONAL STATEMENT IS TREATED AS A PETITION FOR A WRIT OF CERTIORARI, THE PETITION SHOULD BE DENIED.

Respectfully submitted,

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IN THE
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PARKVIEW ASSOCIATES,

Appellant,

v.

CITY OF NEW YORK, COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK and CIVITAS CITIZENS, INC.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
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MOTION TO DISMISS OR AFFIRM

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IN THE
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PARKVIEW ASSOCIATES,

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CITY OF NEW YORK, COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK and CIVITAS CITIZENS, INC.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellee Civitas Citizens, Inc. ("Civitas"), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully moves this Court to dismiss the appeal herein on the ground that no state statute was upheld against a constitutional challenge below or, in the alternative, to affirm the judgment of the New York Court of Appeals on the ground that it is manifest that the federal question on which the decision of the cause depends is so insubstantial as not to need further argument.

PRELIMINARY STATEMENT

This is an appeal from a final judgment entered by the Court of Appeals of the State of New York on February 9, 1988, holding that the City of New York was not estopped from revoking an erroneously issued building permit that violated longstanding zoning regulations, although the property owner had already constructed a substantial portion of the building.

Appellant Parkview Associates ("Parkview") owns property located on East 96th Street, between 90 feet and 190 feet east of Park Avenue, in the Borough of Manhattan, upon which it has constructed a partially-completed 31-story residential building. This building violates the height restrictions of the Special Park Improvement District ("PI District") created by the Zoning Resolution of the City of New York (the "Zoning Resolution"), which limit building heights within the PI District to the lesser of 210 feet or 19 stories. The zoning enactments of the New York City Board of Estimate have at all times since 1973 unambiguously placed the boundary of the PI District at 96th Street 150 feet east of Park Avenue, thereby including 60 feet of Parkview's site. Nevertheless, in November 1985 Parkview obtained a building permit that authorized construction of a 31-story building. The permit was erroneously issued by the New York City Department of Buildings (the "Buildings Department" or "Department of Buildings") at a time when the published version of the applicable zoning map omitted the notation "150" and thereby incorrectly appeared to place the boundary of the PI District only 100 feet east of Park Avenue.[1]

1. Zoning district boundaries are defined by metes and bounds in resolutions adopted by the Board of Estimate. The boundaries are then drawn on maps, which are made available to the public as part of the Zoning Resolution. The maps, like the text of the Zoning Resolu-

On July 22, 1986, upon learning of its mistake, the Buildings Department revoked Parkview's permit and ordered Parkview to stop work above the 19th floor of the building. Parkview appealed this determination to the New York City Board of Standards and Appeals which, on October 14, 1986, affirmed the determination of the Buildings Department, specifically finding that the location of the PI District boundary 150 feet east of Park Avenue was "clearly spelled out" in the relevant legislation.

Parkview then instituted a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") seeking to overturn the revocation of its building permit. The Article 78 petition alleged that Parkview's building was permitted by the Zoning Resolution or, if it was not a permissible structure, that the City was estopped from enforcing the requirements of the Zoning Resolution by its mistaken issuance of a building permit. The petition also claimed that the revocation of the building permit effected an unconstitutional taking without just compensation or due process, in violation of Parkview's rights under the fifth and fourteenth amendments to the Constitution.

tion, are updated when changes are made by the Board of Estimate in accordance with the City's Uniform Land Use Review Procedure ("ULURP") established by §197-c of the New York City Charter. Section 197-c sets forth uniform procedures for "changes, approvals, contracts, consents, permits or authorizations [of proposals and applications] respecting the use, development or improvement of real property subject to city regulation." City Charter §197-c(a). The procedure prescribes the time period within which the Department of City Planning must forward an application to the appropriate community or borough board, following which the board holds public hearings and makes a decision. The application is then reviewed and acted upon by the City Planning Commission, and then, following another public hearing, by the Board of Estimate. Proposed zoning amendments are accompanied through ULURP by a diagram, prepared by the Department of City Planning, that shows the area proposed to be rezoned.

The Supreme Court, New York County, the court of first instance, dismissed Parkview's petition. The court determined that the structure Parkview seeks to complete on its property violates the PI District regulations and that, as a matter of law, the issuance of a permit that violated the Zoning Resolution could not estop the City from enforcing its zoning laws. The Appellate Division, First Department unanimously affirmed the judgment of the Supreme Court, New York County, adopting the Supreme Court's opinion.

The Court of Appeals of the State of New York, having granted Parkview permission to appeal from the Appellate Division decision, affirmed the decisions below, holding that estoppel was not available against a municipality discharging its statutory duties, and that, in any event, the rare exception to the unavailability of estoppel against a governmental entity was inapplicable in this case, "where reasonable diligence by a good-faith inquirer would have disclosed the true facts and the bureaucratic error." 71 N.Y.2d 274, 279 (1988).

QUESTION PRESENTED

May a municipality constitutionally enforce the duly enacted and unambiguous provisions of its zoning ordinace by requiring a builder to remove the noncomplying portion of a building that was constructed pursuant to an erroneously issued, invalid building permit that violated the applicable zoning regulations?

COUNTERSTATEMENT OF THE CASE

A. *The Zoning Chronology*

On April 23, 1973, the Board of Estimate enacted a resolution[2] establishing a special zoning district known as the Special Park Improvement District. The P I District imposed a height limitation of the lesser of 210 feet or 19 stories on all buildings within its boundaries. As initially enacted, this district extended eastward to a line 150 feet east of Park Avenue for its entire length, including the block between 95th and 96th Streets, on which Parkview's property is located. The 150-foot boundary was clearly shown on maps and copies of the Zoning Resolution available through the end of 1982. The map, which is denominated Zoning Map 6b in the looseleaf version of the Zoning Resolution published by the City, included the notation "150" next to 95th Street to delineate the 150-foot extent of the PI District east from Park Avenue.

On March 3, 1983, the Board of Estimate enacted a resolution that both reduced the size of the PI District and amended the zoning of the area being removed from that District.[3] From 88th Street to the middle of the block between 95th and 96th Streets, the eastern boundary of the PI District was moved 50 feet west. Parkview's property was not affected by that change because the new boundary, which was 100 rather than 150 feet east of Park Avenue,

2. Parkview's repeated use of the term "enabling resolution" to describe the Board of Estimate's legislative enactments, Jurisdictional Statement at 6, is misleading. Pursuant to §§197-c and 200 of the City Charter, amendments to the Zoning Resolution are enacted by resolutions passed by the Board of Estimate. In other words, the Board's resolutions constitute enacted law and not mere "enabling" actions.

3. The Board of Estimate resolution simultaneously rezoned the area to be removed from the PI District from R10 to the lower density, smaller scale, and therefore more restrictive, R8.

ran north only to the midline of the block between 95th and 96th Streets. It stopped short of Parkview's property ad therefore left that property within the PI District.

A new edition of Zoning Map 6b was published by the Department of City Planning, reflecting the new 100-foot depth of the PI District south of the centerline of the block between 95th and 96th Streets. The borderline of the PI District north of the centerline of that block, including the PI District's intersection with Parkview's property, appeared as it had on earlier versions of the Zoning Map, indicated by a shaded area or "tone" that extended beyond the new 100-foot line. On the revised loose-leaf version of Zoning Map 6b, the "150" notation at 95th Street was omitted to reflect the new 100-foot measurement at that street.[4] The shading on the new map continued to indicate, as it had on the old, that the PI District at 96th Street extended beyond the 100-foot line. The Department of City Planning somehow neglected to replace at 96th Street the "150" notation that had previously been at 95th Street, to make clear that the boundary of the PI District at 96th Street remained 150 feet east of Park Avenue.[5]

This oversight was first remedied in a diagram prepared by the Department of City Planning in connection with a 1985 zoning action. The diagram, which carried a ULURP certification date of March 18, 1985, bears the notation "150" at 96th Street. This diagram was published in connection with a set of zoning amendments creating a new R8B zoning district, as part of a continuing

4. Pursuant to §76-131(c) of the Zoning Resolution, a zoning district boundary line in a residential district is considered to be 100 feet from the street if no specific numerical notation appears.

5. Exactly how the error occurred is unknown, since no fact-finding hearing was conducted below.

effort to restrict the scale of development in certain areas of the east side. The City Planning recommendation accompanying and incorporating this diagram was approved by the Commission on July 22, 1985 and was enacted by the Board of Estimate on September 19, 1985. In November of 1985, the Department of City Planning distributed a revised version of Zoning Map 6b that also included the "150" notation for 96th Street.[6]

B. *Parkview's Construction of a Noncomplying Building*

Parkview's property is a rectangular lot located on the south side of 96th Street between Park and Lexington Avenues. The lot stretches for 100 feet, from 90 to 190 feet east of Park Avenue. The Zoning Map in effect when an affiliate of Parkview purchased the property on July 15, 1982,[7] correctly showed the PI District Boundary to be 150 feet east of Park Avenue at 96th Street.

Parkview's New Building Application, dated July 27, 1985 and filed on August 7, 1985, proposed a building that rose 19 stories for the western 10-foot strip of the property (the portion within 100 feet of Park Avenue), and 31 stories for the remainder of the building, including the

6. This revised version of Map 6b was distributed in November 1985 in conjunction with the publication of a new edition of the entire loose-leaf Zoning Resolution. The revision did not reflect the September 19, 1985 amendment to Map 6b. A subsequent version of Map 6b issued by the Department of City Planning both reflected the September 19, 1985 amendment and included the "150" notation for 96th Street.

7. Parkview's argument that it is at an extreme corner of the PI District, Jurisdictional Statement at 6, attempts to obscure the fact that its 31-story building is out of character for construction in the vicinity. In fact, most of the other buildings in the vicinity do not exceed 19 stories.

portion within 150 feet of Park Avenue. The Department of Buildings approved Parkview's drawings for zoning purposes on August 12, 1985, and issued an excavation permit on September 24, 1985. Parkview commenced construction in October. On Novermber 21, 1985, the Department of Buildings issued a full building permit, and Parkview continued with construction of the building.

On November 7, 1985, after construction had commenced, the Department of Buildings informed Parkview that its approval was being revoked because the plans did not comply with the R8B zoning adopted in that area. Parkview's architect then reviewed the Department of City Planning diagram that had accompanied the R8B rezoning and that explicitly included the "150" notation at 96th Street, in order to ascertain that Parkview's property was not included in the rezoned area. In his response to the Department of Buildings, he pointed out that Parkview's property was not affected by that zoning amendment; as a result, the Department of Buildings reinstated approval of the plans.

C. *The Revocation of Parkview's Permit*

In June of 1986, at a meeting with staff of the Department of City Planning, Civitas's president learned that Parkview's construction within 150 feet of Park Avenue exceeded the height restrictions of the PI District. The Buildings Department, recognizing its mistake in approving the application, issued a stop work order on July 11, 1986 and invited Parkview to prove that the building was in substantial compliance with the Zoning Resolution. After considering and rejecting Parkview's arguments in favor of its interpretation of the PI District boundary line, the Commissioner continued the stop work order in effect and revoked approval of the plans on July 22, 1986 for

work above the 19th floor. Parkview appealed this determination to the Board of Standards and Appeals which ruled on October 14, 1986 that the PI District boundary, as "clearly spelled out" in the relevant Board of Estimate resolutions, was in fact located 150 feet east of Park Avenue at 96th Street, and affirmed the Buildings Department's action.

Parkview then sought relief from the determination of the Board of Standards and Appeals in this proceeding under Article 78 of the New York Civil Practice Law and Rules (CPLR). The City answered and counterclaimed, seeking an injunction ordering the removal of the offending building. Civitas sought, and was granted, permission to intervene as a respondent under CPLR §7802(d).

D. *The Decisions Below*

As is customary in an Article 78 proceeding, the Supreme Court, New York County (McCooe, J.) ruled without holding a fact-finding hearing, having considered only the petition, supporting affidavits, and legal memorandum submitted by Parkview, and the answers, affidavits and legal memoranda submitted by the City and by Civitas. The court dismissed Parkview's petition in its entirety and declined to rule on the counterclaim.

The Supreme Court held that the Zoning Resolution could only be interpreted to have set the boundary line for the PI District at 96th Street 150 feet east of Park Avenue at all relevant times, that the building permit was thus invalid when issued because it was contrary to the Zoning Resolution, and that, as a matter of law, Parkview could neither gain vested rights nor establish a claim of equitable estoppel by reliance upon such an invalid permit, regardless of its good faith. The court thus explicitly

declined to rule on, or even to hold a hearing with respect to, the factual issue of Parkview's asserted good faith. Slip opinion at 13; Jurisdictional Statement at 17a. The court also noted that Parkview's claims of an unconstitutional taking or deprivation of its property were not ripe, since Parkview had not sought a variance, which was a condition precedent to such claims,[8] and held that in any event the PI District regulations did not deprive Parkview of all reasonable economic uses of the property.

Parkview appealed the dismissal of its petition to the Appellate Division, First Department, which unanimously affirmed the dismissal of the petition, adopting Justice McCooe's opinion.

Parkview then sought to appeal the Appellate Division decision to the Court of Appeals as of right. The Court dismissed the appeal *sua sponte* on the ground that no substantial constitutional question was directly involved. Parkview then moved to appeal by leave of the court, which was granted. On February 9, 1988, the Court of Appeals affirmed the Appellate Division's decision, holding that the municipality could not be estopped from discharging its statutory duties, particularly "where reasonable diligence by a good-faith inquirer would have disclosed the true facts and the bureaucratic error." *Parkview Associates v. City of New York,* 71 N.Y. at 279. The court also noted that it was undisputed that "at the time the permit was issued the Department [of Buildings] erroneously interpreted amended Map 6b as changing the boundary on

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8. Parkview has conceded that a claim that the City's actions effect a taking without just compensation is premature pending a determination on its variance application. Jurisdictional Statement at 28 n.8.

96th Street to 100 feet," while "the boundary-height limitation applicable to Parkview . . . was and had always been 150-feet east of Park Avenue." *Id.* at 177.

When the Court of Appeals denied reargument on April 28, 1988, it also rejected by that action Parkview's express request that the court delete from its opinion the language, quoted above, requiring "reasonable diligence by a good-faith inquirer."

MOTION TO DISMISS

Appellee Civitas hereby moves to dismiss this appeal on the ground that no state statute was upheld against a constitutional challenge below.

Under 28 U.S.C. § 1257(2), this Court has appellate jurisdiction to review a decision, rendered by final judgment or decree of the highest state court that may pass on the question, upholding the validity of a state statute against constitutional challenge. *See, e.g., Lathrop v. Donohue,* 367 U.S. 820, 824 (1961). Although it has long been accepted that a state statute, for these purposes, need not be an act passed by the legislature of a state, *see Erznoznik v. City of Jacksonville,* 422 U.S. 205, 207 n.3 (1975); *Coates v. City of Cincinnati,* 402 U.S. 611 (1971); *King Mfg. Co. v. City Council of Augusta,* 277 U.S. 100 (1928), some act of a legislative character must have withstood constitutional challenge to trigger this Court's appellate review. *See Lathrop v. Donohue,* 367 U.S. at 824 ("the legislative character of the challenged state action, rather than the nature of the agency of the State performing the act, is decisive of the question of jurisdiction").

A legislative act "looks to the future and changes existing conditions by making a new rule, to be applied

thereafter to all or some part of those subject to its power." *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908); *cf. District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) (quoting *Prentis*). Parkview has not identified a single such prospective act that was upheld below, nor can it; no legislative act has affected its property since it was purchased in 1982. Not one of the three events upon which Parkview appears to base its claim, namely, the revocation of its building permit, the erroneous omission of the "150" notation in the 1983 Zoning Map, or the rectification of the 1983 error in 1985, is legislative in nature.

On the contrary, the revocation of Parkview's building permit by the Department of Buildings in 1986 is a classic example of a ministerial, administrative action. The grant or revocation of a particular building permit in accordance with existing regulations affects only one applicant with respect to only one permit and cannot be considered a legislative act. Nor can the inadvertent commission and subsequent correction of a clerk's or printer's error be considered legislative, as those actions could not amend the law. And, just as the 1983 error could not and did not change the boundary of the PI District at 96th Street, neither did the 1985 correction of the Zoning Map to reflect the true boundary effect any amendment.

A. *There Was No Legislative Map Change Affecting Parkview's Property In 1983*

1. The boundary of the PI District at 96th Street has always been located 150 feet east of Park Avenue.

There is no dispute that in 1982, when Parkview purchased the property, it was within the Special Park Improvement District. At that time, the entire eastern boun-

dary of the PI District was located 150 feet east of Park Avenue, as it had been since the creation of the District in 1973. Indeed, it is undisputed that the boundary line remained at that location and was properly indicated on the published zoning maps at the time Parkview's affiliate purchased the property in 1982 and at least until March 3, 1983. It is also beyond dispute that the zoning maps may be amended only by compliance with the provisions of City Charter §197-c, which require notice to the affected Community Board, review of any proposed zoning change by the City Planning Commission, and approval of any change by the Board of Estimate. None of these procedures were followed, so that even if an amendment of Zoning Map 6b affecting Parkview's property had been intended, it would have been ineffective.

The only amendment that has affected the PI District boundary in the vicinity of Parkview's property was the Board of Estimate resolution approved on March 3, 1983. That resolution, however, did not affect the property itself. It reduced the size of the PI District by moving its eastern boundary from 150 to 100 feet east of Park Avenue, but only from 88th Street to the midblock between 95th and 96th Streets, and it rezoned the area thus removed from the District from R10 to R8. It is clear from the text of the resolution, however, that neither of these amendments changed the zoning of any portion of the upper half of the block between 95th and 96th Streets, including Parkview's property.

Parkview argues, however, that a diagram, which was certified by the City Planning Commission on October 25, 1982, and which is referred to in the resolution adopted by the Commission and the Board of Estimate, indicates a change in the location of the boundary at 96th Street by

omitting the "150" notation at 96th Street. This argument must fail not only because it depends on a misreading of the diagram, but also because it mischaracterizes the purpose and authority of the diagram. The diagram, properly read, indicates that the location of the PI District boundary at 96th Street would not change. Moreover, the Board of Standards and Appeals held that the sole purpose of the diagram, and thus the only purpose for which it may be relied on, is to indicate the extent and nature of a proposed rezoning. The legend on the diagram notes that the area to be rezoned is enclosed within a dotted line. The dotted line does not go further north than the midblock between 95th and 96th Streets, indicating clearly and unambiguously that the PI District boundary would not be modified where it crossed Parkview's property 150 feet east of Park Avenue at 96th Street.[9]

Indeed, not a single City Charter requirement was met for amending a zoning district boundary: modification of the PI District boundary at 96th Street was never proposed by the Planning Commission, notice was never given to the Community Board or the public, and neither the Planning Commission nor the Board of Estimate ever voted on a resolution containing the change. A mere clerical error in the preparation of a diagram cannot effect a substantive change in the zoning scheme of New York City in derogation of the procedures established by the City Charter.

Parkview's response is to assert that the Board of Estimate must have ignored both the metes and bounds

9. Moreover, even if Parkview had been correct in asserting that the PI District boundary changed at 96th Street, its building would still have violated the applicable zoning, for it would then have been locaed in and violated the regulations of the more restrictive R8 district.

description contained in the text of its resolution and the restricted purpose of the diagram, and enacted the entire diagram, which lacks the "150" notation, as the zoning map. Parkview then relies on the convention set forth in Zoning Resolution §76-131(c) to assert that the boundary became 100 feet. This use of §76-131(c) is inappropriate, however, because it begs the question; the Board of Estimate never enacted a 100-foot dimension for the PI District boundary line at 96th Street. The location of the boundary was never modified by a legislative body competent to amend the Zoning Resolution, and a boundary duly enacted by the Board of Estimate cannot be changed either by a mapmaker's neglecting to add a dimension where one is required or by the application of an interpretive convention.

2. The issuance by the Department of City Planning of an erroneous map cannot amend the Zoning Resolution and is therefore not a legislative act.

The zoning maps issued by the Department of City Planning are simply codifications of the legislative enactments of the Board of Estimate. To allow "amendments" to be effected by the issuance of an incorrect map would give employees of the Department of City Planning *de facto* power to veto legislation either purposefully or by making mistakes.

Under New York law, distribution of an incorrect Map 6b by the Department of City Planning cannot amend duly enacted legislation any more than distribution of a statute book containing a typographical error can effectively amend a duly enacted statute. *People v. Hartwell,* 166 N.Y. 361 (1901) (matter inserted by publisher does not control interpretation of statute); *Whelan v. Warwick Valley Civic & Social Club,* 89 Misc.2d 577 (Sup.

Ct. Orange Co. 1977), *rev'd on other grounds,* 63 A.D.2d 646 (2d Dep't 1978), *aff'd,* 47 N.Y.2d 970 (1979). Federal law is to the same effect. *See United States v. Welden,* 377 U.S. 95, 98 n.4 (1964) (circulation by U.S. Government Printing Office of version of U.S. Code containing a typographical error cannot amend statute).

B. *The 1985 Correction of Map 6b Was Not a Legislative Action*

The issuance of a corrected map in 1985 was no more a legislative act than the issuance of the erroneous map had been in 1983. Neither effected a change in the location of a zoning district boundary. The 1985 City Planning Commission diagram showing the area removed from the PI District in 1983 as being rezoned from R8 to R8B corrected the clerical error that had been made on the 1983 version of Map 6b by restoring the "150" notation at 96th Street. This diagram, however, could not and did not change the boundary line at 96th Street. That boundary had been located 150 feet east of Park Avenue, unchanged since the creation of the PI District.

Similarly, the revised version of Zoning Map 6b distributed by the Department of City Planning in November 1985, which also contained the restored "150" notation at 96th Street, merely corrected the clerical error that had occasioned the earlier omission of the notation. This rectification did not amend the zoning map any more than the error itself constituted a legislative amendment.

MOTION TO AFFIRM

Alternatively, Appellee Civitas moves to affirm the judgment of the Court of Appeals of the State of New York on the grounds that Parkview had no property in-

terest in the building permit and therefore suffered no deprivation of property without due process or, in the alternative, that even if Parkview had acquired a property interest, none of its rights to due process was violated.

A. *Parkview Acquired No Property Interest In The Building Permit*

In order to sustain a claim of deprivation of property without due process, Parkview must first establish that it had acquired a protected property interest. *Board of Regents of State Colleges v. Roth,* 408 U.S. 548, 570-71 (1972); *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 538 (1985); *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 161 (1980).

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has *already acquired* in specific benefits. . . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Roth, 408 U.S. at 576, 577 (emphasis added).

Property interests are created and defined not by federal constitutional law but rather "by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth,* 408 U.S. at 577; *Loudermill,* 470 U.S. at 588. Once the underlying substantive interest is defined by reference to state law, then "federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the

Due Process Clause." *Memphis Light, Gas and Water Division v. Craft,* 436 U.S. 1, 9 (1978).

While a state cannot rely on a "fiction" that there is no property interest in order to deprive a person of constitutional rights, a genuine lack of entitlement is sufficient to defeat a claim of deprivation of property without due process. Consequently, if state law does not create a legitimate claim of entitlement to a benefit, it is no fiction that there is no property interest.

B. *Under New York Law, a Building Permit Issued For a Noncomplying Building Is Invalid.*

The existence of a due process claim arising from the implementation of zoning laws and building permitting requirements depends, as it does in all other areas of the law, on the existence of an ascertainable, already-acquired property interest. It is undisputed that, in order to undertake construction in New York City, a builder must obtain a building permit, which will be issued when all permit requirements have been met. Administrative Code of City of New York §27-191. The Department of Buildings has no discretion to issue a building permit in response to an application that fails to conform to applicable provisions of law.

And, of particular importance in this context, the Administrative Code explicitly provides for the revocation of a permit that fails to comply with applicable laws and regulations, or "whenever any permit has been issued in error and conditions are such that a permit should not have been issued." Administrative Code of the City of New York §27-197. New York City's procedures are, of course, in accordance with the general rule in New York State. *See Jayne Estates, Inc. v. Raynor,* 22 N.Y.2d 417

(1968); *Reichenbach v. Windward at Southampton,* 80 Misc. 2d 1031 (Sup. Ct. Suffolk Co.), *aff'd,* 48 A.D.2d 909 (2d Dep't 1975), *app. dism.,* 38 N.Y.2d 912 (1976); *see also Parkview,* 71 N.Y.2d at 281. In other words, no legitimate claim of entitlement can be created before the issuance of a valid permit that complies with the zoning regulations.

Parkview's permit has never complied with the applicable zoning requirements: at all relevant times, the PI District boundary was 150 feet east of Park Avenue, and the 31-story portion of the building extending 60 feet into that District has therefore always violated the height restrictions imposed by the zoning regulations. Because Parkview's permit was never valid, Parkview never acquired a property interest in the permit.

C. *It Has Long Been The Law In New York State That a Municipality Cannot Be Estopped From Revoking An Invalid Permit.*

An invalid, erroneously issued permit cannot become valid merely because the recipient of the permit relies on it. Under well established and uniformly applied precedent, New York State does not permit a municipality to be estopped from enforcing a zoning ordinance simply because a developer was able to obtain a building permit, when the permit was unlawful when issued. For this reason as well, there is no property interest in an invalid permit.

The general rule in New York is that a municipality, in exercising its governmental functions, may not be estopped by its conduct. *E.g., E.F.S. Ventures Corp. v. Foster,* 71 N.Y.2d 359, 370 (1988) (decided with *Parkview*); *Scruggs-Leftwich v. Rivercross Tenants' Corp.,* 70

N.Y.2d 949 (1987); *Daleview Nursing Home v. Axelrod,* 62 N.Y.2d 30 (1984); *Hamptons Hospital and Medical Center v. Moore,* 52 N.Y.2d 88 (1981). This rule against estoppel of the government is firmly rooted in the strong policies of protecting the government's sovereign immunity, of separation of powers, and of protecting the public from fraud. *Daleview,* 62 N.Y.2d at 34. Consistent with these policies, the New York courts have repeatedly refused to allow estoppel against a government in order to ratify administrative action contrary to statute. *See, e.g., Morley v. Arricale,* 66 N.Y.2d 665 (1985); *Albert Simon v. Meyerson,* 36 N.Y.2d 300, *app. dism.,* 423 U.S. 908 (1975) (City of New York not bound by Commissioner's original approval and licensing of certain gaming devices in enforcing prohibition against such devices).[10]

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10. In its Jurisdictional Statement, at 25, Parkview alludes to an exception to the prohibition against estoppel, apparently permitted in some jurisdictions when a municipal employee makes a reasonable but erroneous interpretation of an ambiguous law. Although lower courts have referred to such an exception, *see, e.g., Reichenbach v. Windward at Southampton,* 80 Misc. 2d 1031, *aff'd.,* 48 A.D.2d 909 (2d Dep't 1975), (adopting opinion of Sup. Ct. Suffolk Co.), *app. dism.,* 38 N.Y.2d 912 (1976) (relying on *Jantausch v. Borough of Verona,* 41 N.J. Super. 89, 124 A.2d 14, 16-17 (1956), *aff'd,* 24 N.J. 326, 131 A.2d 881 (1957)), the Court of Appeals has never recognized it. Furthermore, even if New York did recognize this exception for a "reasonable but erroneous" interpretation of a zoning ordinance, such an exception would be inapplicable here. This case involves neither an ambiguous statute nor an "interpretation" as that word is usually understood. To define "interpretation" so broadly as to include any reading of a map or page of text would vitiate the purpose of the exception. The dispute here is not about whether the map was read correctly but whether, when read correctly, it accurately represents the law. There is therefore no "interpretation," whether reasonable or not, that would justify the application of this doctrine, if it were to exist under New York law.

Prior to the present case, the Court of Appeals had already applied the principle that an erroneous action by a municipal employee may not estop the government from enforcing its laws to reject precisely the state law claim advanced by Parkview. In *City of Yonkers v. Rentways, Inc.*, 304 N.Y. 499 (1952), a decision on which the Court of Appeals relied in this case, *Parkview*, 71 N.Y.2d at 282, the court expressly considered and rejected the assertion that the improper issuance of a building permit for a prohibited use might estop a municipality from enforcing the use prohibition of its zoning resolution, holding that the City was not estopped from enforcing its zoning laws either by the issuance of the permit or by laches. 304 N.Y. at 504-05. *Accord, B&G Construction Corp. v. Board of Appeals*, 100 N.Y. 700, 703 (1955) (mem.); *City of Buffalo v. Roadway Tr. Co.*, 303 N.Y. 453 (1952).[11]

The lower courts in New York have generally reaffirmed and applied the rule articulated in *Rentways* that estoppel against enforcement of a zoning resolution may not be based upon the erroneous issuance of a building permit. *See Smith v. City of Albany*, 115 A.D.2d 825 (3d Dep't 1985); *Albert v. Board of Standards and Appeals*, 89 A.D.2d 960 (2d Dep't 1982); *Village Green Condominium Corp. v. Nardecchia*, 85 A.D.2d 692 (2d Dep't 1981); *Reichenbach v. Windward at Southampton*, 80 Misc. 2d 1031 (Sup. Ct. Suffolk Co.), *aff'd*, 48 A.D.2d

11. In *Rentways*, a Yonkers city employee had issued a building permit for a commercial garage based upon plans that clearly indicated that the only second level entry to the garage was through a door opening onto an adjacent lot, zoned exclusively for residential use. The garage owner then built the structure and used the vacant, residentially zoned lot for ingress to and egress from the garage. When the City of Yonkers sought to enjoin the business use of the residential lot, the garage owner asserted that the City should be estopped by its previous issuance of a building permit contemplating such use. The court rejected that argument.

909 (2d Dep't 1975) (adopting opinion of Sup. Ct. Suffolk Co.), *app. dism.*, 38 N.Y.2d 912 (1976); *In re Van Wagner Advertising,* N.Y.L.J., July 16, 1986, p. 11, col. 1 (Sup. Ct. N.Y. Co. 1986).

Moreover, many other states as well espouse the doctrine that the erroneous issuance of a building permit does not estop a municipality from enforcing its zoning resolution to enjoin a structure built under such a permit. As one of the leading commentators on the law of zoning has stated, "Courts are in almost complete agreement that no estoppel against the enforcement of an ordinance can be invoked against a municipality when the claim is based upon a municipal officer's ultra vires act." 3 Rathkopf, The Law of Zoning and Planning §45.04 at 45-45; *see also* 4* *d.* §50.04[3] at 50-53 n.19 (1987 Supplement).[12] *Accord,*

12. Courts in the following 13 jurisdictions have rejected claims that a municipality is estopped from enforcing its zoning ordinance against a structure that was constructed under a permit issued in eror: Alabama (*Board of Zoning Adjustment v. Boykin,* 265 Ala. 504, 92 So.2d 906 (1957), California (*Markey v. Danville Warehouse & Lumber Co.*, 119 Cal. App. 2d 1, 259 P.2d 19 (Dist. Ct. App. 1953), Georgia (*Corey Outdoor Advertising v. Board of Zoning Adjustments,* 254 Ga. 221, 327 S.E.2d 178, *app. dismissed,* 474 U.S. 802 (1985)), Hawaii (*County of Kauai v. Pacific Standard Life Insurance Co.*, 165 Hawaii 318, 653 P.2d 766 (1982) *app. dismissed sub nom. Pacific Standard Life Ins. Co. v. Committee to Save Nokolii,* 460 U.S. 1077 (1983)), Iowa (*B&H Invest. Inc. v. Coralville,* 209 N.W.2d 115 (Iowa 1973)), Kentucky (*Holloway Ready Mix Company v. Monfort,* 474 S.W.2d 80 (Kentucky 1968)), Louisiana (*Pailet v. City of New Orleans,* 433 So.2d 1091 (La. App.) *cert. denied,* 440 So.2d 757 (La. 1983)), Massachusetts (*Ferrante v. Board of Appeals of Northampton,* 345 Mass. 158, 186 N.E.2d 471 (1962)), Minnesota (*Howard v. Roseville,* 244 Minn. 343, 70 N.W.2d 404 (1955)), Mississippi (*City of Jackson v. Kirkland,* 276 So.2d 654 (Miss. 1973)), Nevada (*Board of County Commissioners v. C.A.G., Inc.*, 98 Nev. 497, 654 P.2d 531 (1982), Washington (*Eastlake Community Council v. Roanoke Associates, Inc.*, 82 Wash.2d 475, 513 P.2d 36 (1973), and Wisconsin (*Milwaukee v. Leavitt,* 31 Wis. 72, 142 N.W.2d 169 (Wisc. 1966)).

6 A.L.R.2d 960 (1949 & 1985 Supp.).

Federal courts have applied this widespread state law doctrine that the issuance of an unlawful building permit does not prevent a municipality from revoking the invalid permit. In *Hynes v. Pasco County,* 801 F.2d 1269 (11th Cir. 1986) (per curiam), the Eleventh Circuit Court of Appeals affirmed the district court's dismissal, for failure to state a federal claim, of a constitutional due process challenge to the revocation of a building permit. As in this case, the permit obtained by the applicant had later been determined to have been in violation of the local zoning ordinance and therefore invalid when issued. In its terse per curiam opinion, the circuit court characterized the federal claim as an improper attempt by the plaintiff "to raise to constitutional level the normal operation of a zoning system," noting that "[t]he federal courts will not sit as a zoning review board." *Id.* at 1270. *See also Carolan v. City of Kansas City,* 813 F.2d 178 (8th Cir. 1987).

It is important to note that New York law distinguishes the present factual circumstances, which involve the revocation of a permit that was invalid when issued, from a situation in which the applicable zoning is amended after reliance upon the issuance of a permit that complied with the zoning regulations in effect prior to the amendment. In the latter case, state law does recognize a property interest in the permit. *See, e.g., Natchev v. Klein,* 41 N.Y.2d 833 (1977); *Jayne Estates,* 22 N.Y.2d 417; *Reichenbach,* 48 A.D.2d 909 (2d Dep't 1975), *app. dism.,* 38 N.Y.2d 912 (1976); *cf. also Wheeler v. City of Pleasant Grove,* 664 F.2d 99 (5th Cir. Unit B 1981), *cert. denied,* 456 U.S. 973 (1982) (distinguished in *Hynes*, 801 F.2d 1269). Indeed, this rule is codified in New York City by §11-33 of the Zoning Resolution. In this case, however, there was no change, legislative or otherwise, in the zoning

of Parkview's property after it obtained the building permit: the PI District boundary affecting its property was at all times 150 feet east of Park Avenue.

D. *Parkview's Assertion That The City Created a "Fiction" To Deprive it of its Property Interest Is Incorrect.*

The decisions of this Court that Parkview cites in an attempt to prove that the City has created a fiction to deprive it of its property interest are inapposite because they involved state statutes that, as the Court noted in each such case, by their terms established property interests. *See Memphis Light,* 436 U.S. 1 (statutory provision that utility permitted to terminate service only "for cause" created "legitimate claim of entitlement," *id.* at 11-12); *Loudermill,* 470 U.S. 532 (statute entitling classified civil service employees to retain their positions "during good behavior and efficient service" created "more than a unilateral expectation" regarding continued employment. *Id.* at 538). *Cf. also Webb's Fabulous Pharmacies,* 449 U.S. at 164 (holding, explicitly limited to "narrow circumstances" of case, that county's retaining interest on an interpleader fund when it already charged a clerk's fee "for services rendered" constituted taking of property without just compensation).

Nor does *Hodes v. Axelrod,* 70 N.Y.2d 364 (1987), support Parkview's argument that the City is relying on a fiction to justify its revocation of the building permit. Jurisdictional Statement at 24. First, *Hodes* concerns the vested rights doctrine, which upholds the finality of judgments in the face of subsequent legislation. 70 N.Y.2d at 370. The decision is therefore inapplicable to this case, which involves the relationship of existing legislation and an inadvertent, improper administrative action. Second,

although not relevant here because there was no retroactive change in the zoning, Parkview's use of the *Hodes* opinion is misleading: contrary to the sense of the passage that Parkview quoted, the decision actually recognizes the increasingly broad acceptance of the retroactivity of legislation.

E. *Charging Parkview with Knowledge of the Zoning Law Does Not Violate Due Process*

Parkview claims that charging it with knowledge of the PI District's boundaries somehow violates due process. This assertion, however, contravenes settled New York law and is inconsistent with the facts of this case. The law presumes that a building permit applicant has constructive knowledge of the current zoning regulations applicable to its property, *Rosenbush v. Keller,* 247 A.D. 248 (2d Dep't), *aff'd,* 271 N.Y. 282 (1936) (applicant held to have constructive if not actual knowledge of a zoning change adopted before permit approved), and the circumstances of this case suggest that Parkview should also be charged with knowledge of how much of its property remained within the PI District.[13]

First, there is no dispute that the loose-leaf version of Zoning Map 6b publicly available when Parkview purchased the property unequivocally indicated that the PI District extended 150 feet eastward from Park Avenue at 96th Street.

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13. In this regard, it is important to note that the issues of whether Parkview had actual knowledge or was proceeding in good faith were not litigated below. The Supreme Court, which held no fact-finding hearing, explicitly held it "unnecessary to consider the factual issues as to [Parkview's] good faith." Slip Opinion at 13, Jurisdictional Statement at 17a.

Second, the loose-leaf Map 6b upon which Parkview claims that it relied indicated by shading that the PI District extended farther east at 96th Street than the 100-foot boundary at 95th Street. While insufficient to establish conclusively the location of the boundary, this indication should have put Parkview on notice to verify the PI District boundary, especially in light of what it should have known about the property when it made the acquisition, based on the then current zoning map.

Finally, Parkview's architects examined the certified diagram prepared by the Department of City Planning in connection with the downzoning of the area adjacent to Parkview's property to an R8B district in 1985. As noted above, that diagram clearly indicated the 150-foot eastward reach of the PI District at 96th Street.

Parkview's arguments about the requirements with which a government must comply when it promulgates laws, Jurisdictional Statement at 17-18, are consistent with the presumption of constructive knowledge with which New York law and the circumstances of this case charge it. While *Texaco, Inc. v. Short,* 454 U.S. 516 (1982), affirms the proposition that "[g]enerally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comp[illegible]' *id.* at 532, neither this abstract proposition of black-letter law nor the holding of *Texaco* affords Parkview comfort in this case.

In *Texaco,* the Court upheld an Indiana statute that provided for the automatic lapse of severed mining interests that had remained inactive for twenty years, with a two-year grace period for interests that would otherwise lapse on the effective date of the statute, holding that the state legislature had complied with the constitutional pro-

cedural requirements in enacting this statute. The statute in *Texaco* was thus new legislation that extinguished clearly established property rights. In this case, there was no legislative change that affected Parkview's lot, and Parkview was not deprived of a property interest since its building permit was invalid when issued. In addition, the exception to the presumption of knowledge of applicable laws, on which Parkview relies to justify its claimed ignorance of the correct boundary of the PI District at 96th Street, Jurisdictional Statement at 17, is neither part of the Court's opinion in *Texaco* nor applicable to this case.[14] Parkview has thus failed to show any way in which the City violated its due process rights.

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14. That exception, discussed only by the dissent in *Texaco*, is based on *Lambert v. California*, 355 U.S. 225 (1957), which concerned a municipal ordinance that made it an offense for any convicted felon to remain in the city of Los Angeles for more than five days without registering with the police. The Court held the ordinance unconstitutional because it deprived of his liberty a person who neither knew nor could reasonably be expected to know of his legal obligation. This exception is irrelevant not only to the holding in *Texaco* but also to the circumstances of this case.

CONCLUSION

Wherefore, Appellee Civitas Citizens, Inc. respectfully submits that the federal question upon which this cause depends is so insubstantial as not to need further argument, and moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Court of Appeals of the State of New York.

July 11, 1988

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No. 87-1837

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

PARKVIEW ASSOCIATES,

Appellant,

v.

CITY OF NEW YORK, COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK and CIVITAS CITIZENS, INC.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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IN THE

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PARKVIEW ASSOCIATES,

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Preliminary Statement

"Due process asks whether government has treated someone fairly . . . ." Brennan, *Reason, Passion and "The Progress of the Law"*, 42 Rec. A.B. City N.Y. 948, 966 (1987). The City cannot pass that test.[1]

Appellees devote most of their energy to establishing a proposition that is neither disputed nor dispositive, *i.e.*, that it has been determined by New York's highest court that, as a matter of state law, the PI District's boundary at 96th Street is and always was 150 feet from Park Avenue.

That proposition begs the question, however, of whether it is consistent with due process for the City of New York, having systematically and authoritatively represented that the boundary was only 100 feet from Park Avenue, to apply to appellant the provisions of its Administrative Code and Zoning Resolution so as to revoke a permit on the fiction that it was without any validity and conferred no rights. *See, e.g., O'Brien v. Skin-*

1 The abbreviations and references herein are those used in appellant's jurisdictional statement, which is cited herein as "J.S."

ner, 414 U.S. 524, 531 (1974); *Kingsley Pictures Corp. v. New York State Board of Regents*, 360 U.S. 684, 688-689 (1959).

Unlike the zoning cases relied upon by the City, this one is not routine. Appellant's "planning dispute" is not "run of the mill" or "conventional" (*cf. Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 [1st Cir.], *cert. denied*, 459 U.S. 989 [1982]); appellant does not challenge "the normal operation of a zoning system" (*cf. Hynes v. Pasco County*, 801 F.2d 1269, 1270 [11th Cir. 1986]); it is not asking this Court to "sit as a zoning board of appeals" (*Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 [1974] [Marshall, J., dissenting]). The Court of Appeals may have determined the location of the PI District's boundary, but not before appellant had put up 31 stories, at a cost of $7.2 million, in reliance upon a permit and the City's official zoning map. "The past cannot always be erased by a new judicial declaration." *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374 (1940).

Land use is principally a matter for state and local regulation, so that, "perhaps particularly with respect to matters involving the regulation of land," this Court owes the States' judgments "great deference." *Texaco, Inc. v. Short*, 454 U.S. 516, 554 (1982) (Brennan, J., dissenting). "Nevertheless, the Due Process Clause of the Fourteenth Amendment was designed to guard owners of property from the wholly arbitrary actions of state governments." *Id.* It has been observed, moreover, that "[t]he 1980s have been a decade of enormous innovation at the state level," and that "at both the state and local levels, we are in the midst of a new progressive era." Osborne, *Laboratories of Democracy* 1-3 (1988). It therefore is imperative that this Court continue to refine the principles of due process that circumscribe the efforts of the States and their instrumentalities to regulate private property and commercial activity.

As shown below, (1) this Court has jurisdiction of this case, (2) the questions presented are substantial, and (3) they are ripe notwithstanding the variance application.

I. Appellant Has Properly Invoked This Court's Appellate Jurisdiction Under 28 U.S.C. § 1257(2)

When appellant took this appeal, 28 U.S.C. § 1257(2) gave this Court jurisdiction, because there "is drawn in question the

validity of a statute . . . on the ground of its being repugnant to the Constitution . . . , and the decision is in favor of its validity." Appellees argue that appellant's due process claims are not subject to appellate review in this Court because they "challenge . . . the effect of the exercise of authority under local law without otherwise drawing into question the constitutional validity of any statute" (City Mtn. p. 19; *see also* Civitas Mtn. pp. 11-12). Appellees are wrong.

The reference in § 1257(2) to a "statute" includes local ordinances. *See, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207 n.3 (1975); *King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100, 114 (1928). Furthermore, the claim of invalidity may be a claim that a statute or ordinance that is valid on its face has been construed and applied to particular facts in a manner that is unconstitutional. *See, e.g., International Longshoremen's Ass'n v. Davis*, 106 S.Ct. 1904, 1910 n.8 (1986); *Cohen v. California*, 403 U.S. 15, 17-18 (1971).

The City consistently has justified its revocation of appellant's permit on the theory that, under Administrative Code § 27-197 and the Zoning Resolution, it had no discretion to do otherwise; appellant consistently has attacked that position as repugnant to due process. The Court of Appeals expressly held that, in view of § 27-197 and the Zoning Resolution, "there was no discretion reposed in" the City's agencies "to do otherwise" than revoke appellant's permit "on the record before them" (J.S. App. p. 7a); it nevertheless refused to adjudicate, and thus rejected (*see* J.S. pp. 28-29), what it characterized as a "claim that the City's action constitutes a taking without due process" (J.S. App. p. 8a). In reaching these conclusions, the court necessarily rejected the contention that these statutes, as construed and applied by the City, were unconstitutional.

The record further demonstrates such rejection. Thus, in its main brief to the Court of Appeals, appellant stated that one of the questions presented was whether "the City's retroactive *application* of its reinterpretation *of its zoning laws* constitute[d] a denial of due process in contravention of the Fourteenth Amendment to the Constitution of the United States" (p. 6) (emphasis added). In *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928), this Court stated:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution . . . . No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.

See also, e.g., Street v. New York, 394 U.S. 576, 584 (1969); *Braniff Airways, Inc. v. Nebraska State Board of Equalization*, 347 U.S. 590, 599 (1954). Appellant put the court below on fair notice of its claim that the City was applying a statute in a manner that was repugnant to the Fourteenth Amendment.

II. Appellant Has Asserted Substantial Constitutional Claims

Appellant's constitutional claims are substantial (*see* J.S. pp. 16-29). As shown below, (a) appellant has been deprived of property, and (b) appellant was entitled to rely on the City's zoning map, which authoritatively depicted the PI District's boundary to be 100 feet from Park Avenue.

A. Appellant Has Been Deprived of "Property"

For purposes of constitutional law, the term "property" refers broadly to "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it,"-so that the constitutional protections afforded to property owners are "addressed to every sort of interest the citizen may possess." *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945); *see also Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 142 (1978) (Rehnquist, J., dissenting).

Appellant's property rights included the right to develop its parcel to the maximum extent authorized by law; appellant therefore had a reasonable expectation that it would be able to derive some profit. The manner in which the City has applied its statutes, however, has deprived appellant of any opportunity profitably to construct a building that conforms with the City's zoning laws (*see* J.S. p. 8). Furthermore, although appellant had topped off its building at 31 stories and spent $7.2 million in construction costs when it first learned that its permit might be infirm, all construction has been halted since 1986. Appel-

lant has been unable to complete the building and sell the units while the top twelve stories remain in dispute. The Property has generated no income for two years. In the meantime, the City has continued to assess real estate taxes, other carrying charges also continue, and construction costs escalate. In addition, if the building is completed pursuant to a variance rather than on an as-of-right basis, appellant will lose substantial tax abatements. Therefore, regardless of whether the permit itself constituted property, appellant plainly has suffered a substantial deprivation of property.

As to the permit itself, moreover, it also constitutes property, "[f]or a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property . . . never existed at all." *Hughes v. Washington*, 389 U.S. 290, 296-297 (1967) (Stewart, J., concurring). On the facts of this case, such a fiction is not consistent with due process (*see* J.S. pp. 23-27).[2]

B. Appellant Was Entitled to Rely on the Zoning Map, Which Depicted the Boundary at 100 Feet

Although the Court of Appeals determined that the PI District extends 150 feet from Park Avenue, no such determination had been made when appellant obtained its permit and put up its 31 stories, and there was no reason for appellant to believe that such a determination could be made. Indeed, so far as appellant or the public knew, there was no issue to be determined. Therefore, it is inconsistent with due process to apply the determination retroactively (*see* J.S. pp. 23-27).

Appellant's permit was issued after meticulous examination of its building plans and in conformity with the City's official

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2 The City refers to a brief resumption of construction after the revocation of appellant's permit in July of 1986 (City Mtn. pp. 11-12). While appellant's administrative appeal was pending before the BSA, "all proceedings in furtherance of the action appealed from" were stayed "unless" the Commissioner of Buildings certified that "a stay would in his opinion cause imminent peril to life or property . . . ." City Charter § 669(c). The Commissioner never made any such certification, so appellant lawfully, and briefly, resumed construction. This temporary resumption is irrelevant, because appellant never has sought to predicate any legal or equitable rights on the work performed during the resumption.

zoning map, a document prepared and published by the City and intended to be authoritative (*see* J.S. pp. 5-6, 18-19). This case is not one in which a citizen relied upon an oral interpretation by a governmental official or agent. *Cf. Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 56 (1984); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 382 (1947).

At the relevant times, the zoning map depicted the PI District's boundary as 100 feet from Park Avenue at 96th Street. It showed no numerical dimension specifying a different distance, and the interpretation of the map therefore appeared to be governed by unambiguous statutory rules.[3]

The depiction on the map was no mere printer's error. Contrary to a central contention of appellees (City Mtn. pp. 7-8, 30-32; Civitas Mtn. pp. 13-14), the legislation approved by the Board of Estimate on March 3, 1983, was *not* clear and free from ambiguity. The legislation's implementation and incorporation in the City's official zoning maps therefore required

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3 A copy of zoning map 6b as it existed at the relevant times is Appendix 1 hereto. The relevant statute, *i.e.*, the Zoning Resolution, expressly provides that "[t]he location and boundaries of the districts established by this resolution are shown upon the zoning *maps*" (§ 11-14), and that "[t]he district boundaries on the *zoning maps* shall be interpreted in accordance with the provisions set forth in . . . Section 76-13" (§ 76-11) (emphasis in original). Section 76-13 mandates that "[t]he precise location of a boundary line is to be interpreted in accordance with the provisions set forth in this Section," and one of that section's subsections, § 76-131, provides, as applied to this case, that "where a boundary line extends parallel to [Park Avenue] and no dimensions are shown, such boundary line shall be considered to be located . . . (c) . . . 100 feet from [Park Avenue]." The City's contention that § 76-131(c) does not apply here because the Board of Estimate's resolution supposedly "clearly indicates dimensions" (Mtn. pp. 37-38) is preposterous. The term "dimensions" as used in the statute refers to the numerical dimensions on the zoning maps, not to anything in Board of Estimate resolutions, which are not part of the Zoning Resolution. Even Civitas concedes that § 76-131(c), by its terms, applied to map 6b (*see* Mtn. p. 6 n.4). Similarly, counsel to the Department of Buildings conceded before the BSA that § 76-131(c) applied.

interpretation.[4] For the same reason, the City's actions in changing that depiction were not merely ministerial, and appellant was entitled to notice of that change (*see* J.S. pp. 20-22).[5]

Nor is there merit to appellees' contention that the decision below is just another application of an established state law rule that a building permit issued in error confers no rights and may be revoked (*see* City Mtn. pp. 28-29, 41-44; Civitas Mtn. pp. 18-22). This case dramatically extends that rule to unprecedented facts. Prior cases involved misinterpretations of the zoning ordinance by a building inspector or inadequate or deceptive building plans that misled the inspector. Appellant, by contrast, submitted accurate plans to the Department of Buildings, which construed the Zoning Resolution in a reasonable manner on the basis of the materials provided to it by the Department of City Planning, *i.e.*, the sister agency responsible for drafting and preparing zoning legislation and revising and publishing zoning maps once such legislation has been enacted.

Appellees' other contentions also are without merit. For example, Civitas argues, and the City implies, that appellant should have been alerted to the possibility that map 6b was erroneous by shading that suggested that the PI District might extend more than 100 feet from Park Avenue at 96th Street (Civitas Mtn. pp. 6, 26; City Mtn. p. 53). But appellees' conten-

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4 The legislation incorporated a diagram (Appendix 2 hereto) that plainly depicted the PI District's boundary at 100 feet from Park Avenue at 96th Street. The diagram, which was dated October 25, 1982, had been prepared by the Department of City Planning, certified by the City Planning Commission and reviewed at numerous public hearings in the course of the City's ULURP process. A similar diagram (Appendix 3 hereto) dated December 5, 1983, which had been prepared, certified, reviewed and approved as part of subsequent legislation adopted by the Board of Estimate, contained the same depiction. By contrast, a draft thereof depicted the boundary at *150* feet from Park Avenue at 96th Street, but that draft never was certified by the City Planning Commission and never was approved by the Board of Estimate. Clearly, the boundary's precise location at 96th Street was the subject of review in 1983 within the Department of City Planning, and its depiction on map 6b reflected an act of interpretation by that agency.

5 Appellees' analogy between the zoning map and a codification of statutes (City Mtn. pp. 33-34, Civitas Mtn. pp. 15-16) is misplaced. None of the cases cited by appellees involved documents like the City's zoning maps, which are prepared and published by the same agency that drafts the underlying legislation.

tion is belied by their own conduct: the City and Civitas themselves relied, without raising *any* question or conducting *any* further inquiry, on the same map.[6]

This reliance by *all* parties on the zoning map was consistent with the Zoning Resolution (*see* p. 6 and n.3, *supra*). Furthermore, the lower courts did not find (and the Court of Appeals had no jurisdiction to find) that appellant's reliance on map 6b was unreasonable (*see* J.S. p. 16 n. 3). In view of the unambiguous statutory rules for interpreting that map, the record would not support any such finding.[7]

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6 The City insinuates that it merely relied upon a certification by appellant's architects (Mtn. pp. 9-10). The record, however, contains uncontradicted eyewitness affidavit testimony that the examiner at the Department of Buildings actually reviewed map 6b to ascertain the relevant zoning (*see also* J.S. pp. 9-10 and n.2). Indeed, the examiner was obligated to do so: under the applicable statute, Administrative Code § 27-191, "[a]ll applications for permits and any accompanying plans . . . shall be examined . . . for compliance with the provisions of this code and other applicable laws"; the regulations of the Department of Buildings authorize examiners to rely on architects' certifications that building plans comply with certain enumerated statutes, *not* including the Zoning Resolution; it is the examiner's responsibility, under the express terms of those regulations, to conduct a *full* examination of all building plans for compliance with "[a]ll applicable provisions of the Zoning Resolution"—which is precisely what the examiner in this case did.

7 Contrary to appellees' unwarranted speculation (City Mtn. p. 53, Civitas Mtn. p. 25), the possibility that appellant's principals examined map 6b in 1982, when they acquired the Property, is irrelevant; it is undisputed that map 6b was changed materially in 1983 and 1984 and, moreover, that appellant's intentions as to how to develop the Property changed dramatically in 1984. Thereafter, appellant commissioned experienced architects, whose responsibilities included ascertaining the zoning applicable to the Property. Under New York law, the question of whether conduct amounts to negligence is a question of fact. *See, e.g., Ugarriza v. Schmieder*, 46 N.Y.2d 471, 475 (1979). New York's highest court has specifically held, moreover, that the question of whether an architect acted diligently in his dealings with the City's Department of Buildings cannot be determined without expert testimony. *530 East 89 Corp. v. Unger*, 43 N.Y.2d 776, 777-778 (1977). In the present case, appellant adduced affidavit testimony about industry custom and practice; appellees adduced none. Contrary to Civitas's misinterpretation of the record, moreover (Mtn. pp. 8, 26), appellant's architects did not examine, in November of 1985 or on any other relevant occasion, any diagram showing the PI District's boundary to be 150 feet from Park Avenue.

III. Appellant's Due Process Claims Are Ripe for Adjudication Notwithstanding the Variance Application's Pendency

The City asserts that "the pendency of the variance application makes the extent of [appellant's] harm, if any, incapable of determination at this time" (p. 21), and it argues that therefore the "due process claim is prematurely asserted" (p. 49). There is no merit to this contention.

The suggestion that a determination of the variance application is necessary to ascertain whether appellant will suffer "any" harm is offensive. Although the precise extent of appellant's injuries remains unclear, appellant plainly has suffered enormous injuries that no variance will cure (*see* pp. 4-5, *supra*). Unlike a claim that zoning laws have effectuated a taking without compensation, a claim that an owner has been deprived of property without due process does not require a final reckoning of the precise quantum of harm (*see* J.S. pp. 27-28).

Appellant brought the present litigation, moreover, to vindicate *legal* rights. It is entitled to have its claims adjudicated in a court of law; any factual issues should not be relegated to the informal procedures of the BSA, where witnesses are not sworn and there is no cross-examination.

Furthermore, adjudication of appellant's legal claims should not be avoided on the theory that resolution of the variance application is imminent. Although the BSA has scheduled a hearing on the variance application for August 9, 1988, and although appellant believes that it is entitled to a variance, none will be issued on August 9. The process will require several hearings and sessions extending over months. It is not certain, moreover, that appellant *ever* will obtain a variance; Civitas certainly will oppose the application.

If appellant obtains a variance, Civitas in all likelihood will seek review, pursuant to City Charter § 668(c), by the Board of Estimate, a body of elected officials. While the Board of Estimate's power to review variances is circumscribed by statute, it often has exceeded those powers and improperly annulled law-

ful variances.[8] With an eye obviously cast on the publicity that this case has generated, one member of the Board of Estimate, *i.e.*, the City's Comptroller, already has stated publicly and repeatedly that appellant should *not* be granted a variance. The variance application thus is likely to lead to further litigation.[9]

Conclusion

This Court has appellate jurisdiction of this case, which raises substantial constitutional questions.

July 21, 1988

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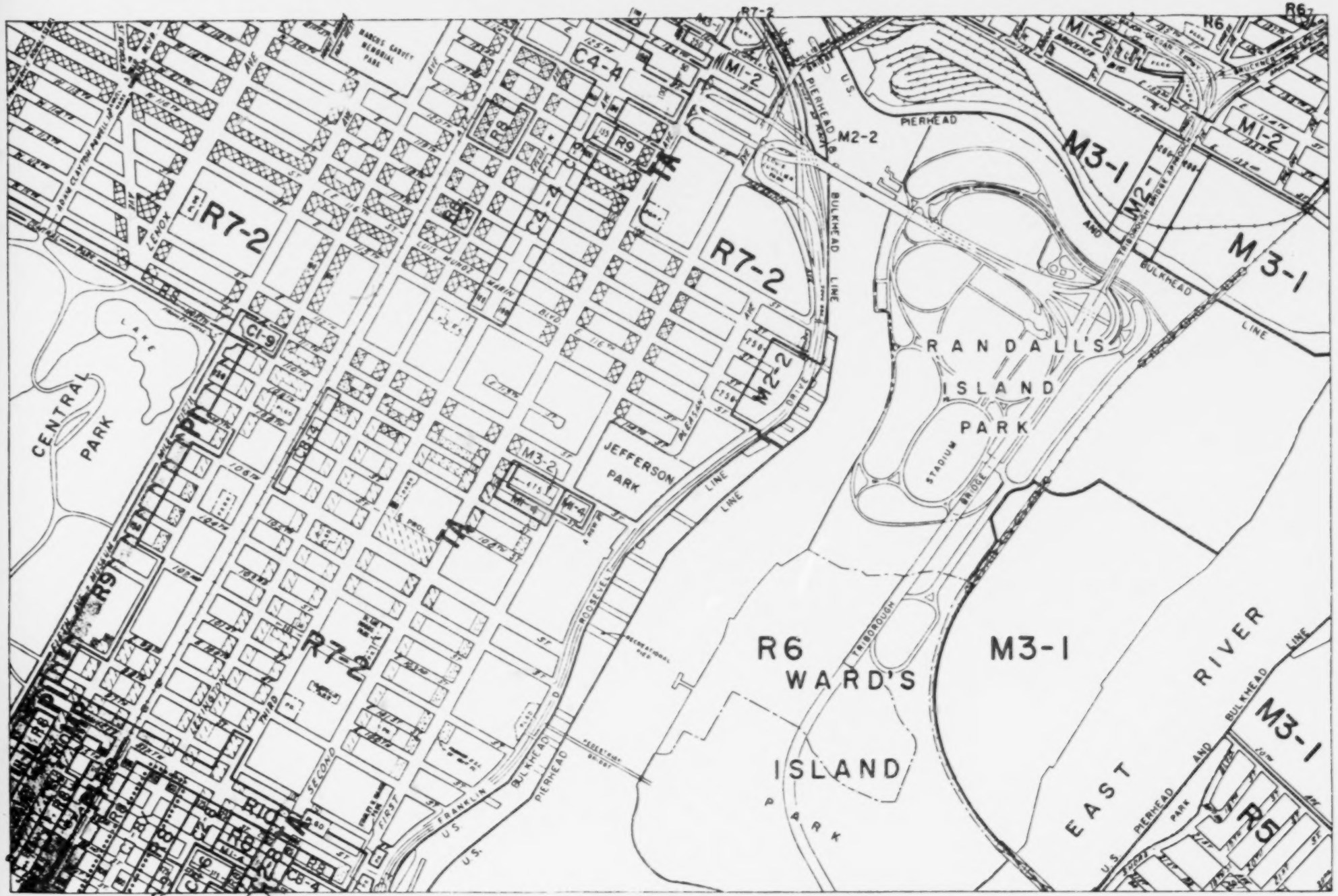
8 *See, e.g., 97 Columbia Heights Housing Corp. v. Board of Estimate*, 67 N.Y.2d 725, 727 (1986); *Victory Boulevard Associates v. City of New York*, 58 N.Y.2d 900, 901 (1983); *High Point Enterprises, Inc. v. Board of Estimate*, 67 A.D.2d 914 (2d Dep't), *aff'd*, 47 N.Y.2d 935 (1979); *Armil Realty Corp. v. Board of Estimate*, 66 A.D.2d 888, 889 (2d Dep't 1978), *aff'd*, 48 N.Y.2d 741 (1979); *Ammirati v. Board of Estimate*, 72 A.D.2d 812 (2d Dep't 1979); *Peter Pan Games of Bayside, Ltd. v. Board of Estimate*, 67 A.D.2d 925 (2d Dep't 1979).

9 Contrary to the City's suggestion (Mtn. p. 55), appellant has proceeded diligently in seeking a variance; the City is responsible for the delay. The court of first instance rendered its decision in November of 1986. Appellant immediately commenced the simultaneous pursuit of both appellate review in the courts and a zoning variance. In December of 1986, as a necessary prerequisite to seeking a variance, appellant resubmitted its building plans to the Department of Buildings and requested a complete reexamination, so that its variance application would be based upon a definitive statement of zoning objections. The Department of Buildings did not conclude that reexamination until May of 1987, at which time appellant immediately filed its application with the BSA, which could not schedule a hearing until the summer of 1988 because it took that long for other city agencies to review appellant's draft environmental impact statement.

Appendix 1

Zoning map 6b, as in public circulation from mid-1984 until December of 1985



ZONING MAP

THE NEW YORK CITY PLANNING COMMISSION

MAJOR ZONING CLASSIFICATIONS

N

R — RESIDENTIAL DISTRICT

C — COMMERCIAL DISTRICT

M — MANUFACTURING DISTRICT

The number(s) and/or letter(s) which follows an "R", "C", or "M" district designation indicates use, bulk, and other controls as described in the text of the Zoning Resolution.

SPECIAL PURPOSE DISTRICTS

The letter(s) within the shaded area designates the special purpose district as described in the text of the Zoning Resolution.

INDICATES PROPERTY REZONED BY AMENDMENT EFFECTIVE : 5-24-84
A-1398

(D) RESTRICTIVE DECLARATION, FOR DETAIL REFER TO R.D. SHEET.

MAP KEY

5c	6a	6c
5d	**6b**	6d
8c	9a	9c

ZONING MAP 6b

C1-1 C1-2 C1-3 C1-4 C1-5 C2-1 C2-2 C2-3 C2-4 C2-5

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Appendix 2

Diagram dated October 25, 1982, certified by City Planning Commission and incorporated in Board of Estimate's resolution of March 3, 1983

C 830111 ZMM

D-22

CENTRAL PARK

METROPOLITAN MUSEUM OF ART

CITY PLANNING COMMISSION
CITY OF NEW YORK

DIAGRAM SHOWING PROPOSED ZONING CHANGE ON SECTIONAL MAPS 5d, 6b, 8c & 9a

BOROUGH OF MANHATTAN

Certification Date
New York, October 25, 1982

Director of Technical Review

Chief Engineer

SCALE IN FEET
600 300 0 600

NOTE:

——— indicates Zoning District boundary.

..... The area enclosed by the fine dotted line is proposed to be changed from C1-9, R10 and PI Districts to C1-7, C1-8A, R9A, R8, R7-2 and LH-1A Districts.

C5-1 indicates a C1-5 District.

LH-1A indicates a Limited Height District.

MP indicates a Special Madison Avenue Preservation District.

PI indicates a Special Park Improvement District.

Y indicates a Special Yorkville East 86th Street District.

MID indicates a Special Midtown Development District.

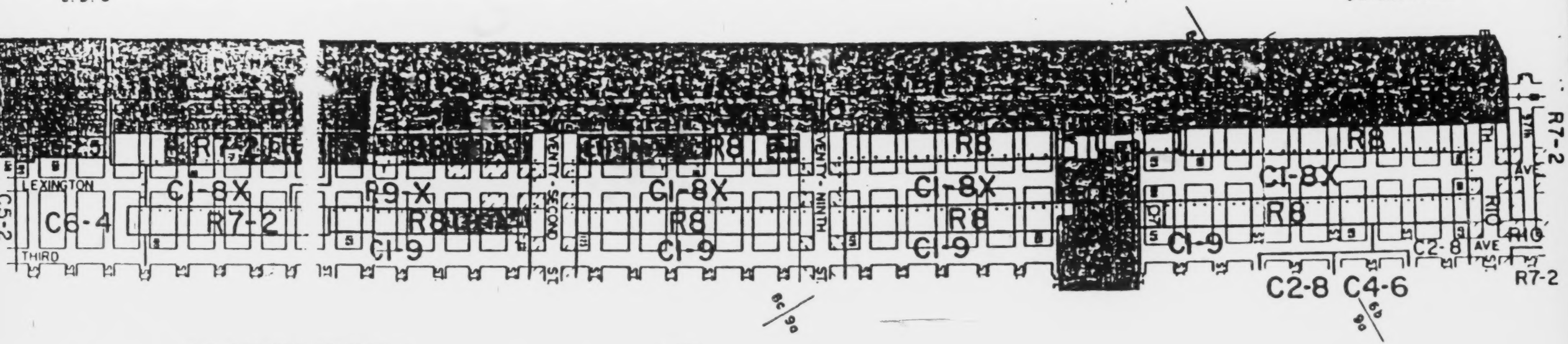
(D) indicates a Restrictive Declaration Area.

Appendix 3

Diagram dated December 5, 1983, certified by City Planning Commission and incorporated in Board of Estimate's resolution of May 24, 1984

C. D. 8

C 840364 ZMM



CITY PLANNING COMMISSION
CITY OF N · YORK
DIAGRAM SHOWI VG PROPOSED
ZONING :HANGE
ON SECTIO IAL MAPS
6b, 8c & 9a
BOROUC H OF
MANHA TAN

Certification Date
New York, December 5, 1983

Sotirios Vogges
Director of Technical Review

Julius Spiegel P.E.
Chief Engineer

SCALE IN FEET
600 300 0 600

NOTE:

——— Indicates Zoning District Boundary.

..... The area enclosed by the fine dotted line is proposed to be changed from C1-8A and R9A Districts to C1-8X and R9X Districts.

Indicates a C1-5 District.
Indicates a Limited Height District.
Indicates a Special Park Improvement District.
Indicates a Special Yorkville East 86th. Street District.
Indicates a Special Midtown Development District.